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UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS AND LAW

LAW

The Duty Of Good Faith In Insurance Law: A Study Of Saudi Law Compared To English Law

2 Volumes

Volume 1

By

Arwa Ibrahim A Aljallal

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ABSTRACT

FACULTY OF BUSINESS AND LAW

Law

Doctor of Philosophy

THE DUTY OF GOOD FAITH IN INSURANCE LAW: A STUDY OF SAUDI LAW
COMPARED TO ENGLISH LAW

By: Arwa Ibrahim A Aljallal

The duty of good faith in insurance law is a significant legal principle in remedying the asymmetry in information between parties of an insurance contract. Such duty in Saudi insurance laws is not clear whether regarding its concept, limits, remedies or its application to intermediaries, with many legal gaps surrounding its application. Also, the number of cases containing a violation of the duty of good faith is considered 'high' and mostly done by the assureds. On the other hand, the consequences of breaching the duty of good faith may have serious effects on the insurance cover and liability of the parties. Hence, there is a need for clarifying the duty as a whole to make it more comprehensible, and to provide recommendations for developing the approach of Saudi insurance laws in general and regarding the duty of good faith in particular considering the various legal gaps in current laws and regulations. The Saudi enforcement and judicial systems lack experience in insurance cases due to the late official recognition of insurance as a transaction and the relatively recent promulgation of insurance laws and regulations. Considering Islamic law's doubts about insurance as a contract, insurance was practised in Saudi Arabia without official laws for a long period and the effects were disastrous on the assureds and on the industry. Commercial or conventional insurance is forbidden in Saudi Arabia, as the first comprehensive law regulating the insurance business which was not promulgated until 2003, indicates that only cooperative insurance is to be practised there. The English experience as an international hub for insurance and reinsurance provides valuable guidance to develop Saudi insurance laws and regulations, especially because English Insurance laws were used as a source of guidance when initially drafting Saudi insurance laws. In this thesis, the duty of good faith will be examined and compared in English and Saudi insurance laws and regulations. Suggestions for developing Saudi insurance laws will be given throughout, to improve the application of the duty and to balance the rights of the assureds and insurers. The suggestions aim to clarify the duty and to fill the legal gaps by developing a just approach regarding the concept of the duty of good faith, its limits, application to intermediaries, and remedies available in case of its breach, with a general consideration to protect policy holders, besides providing overall recommendations to improve the Saudi legal system regarding insurance. The thesis can clarify such duty of good faith and the remedies of breach and provide suggestions to fill the legal gaps in Saudi insurance laws benefiting assureds, legal practitioners, judges, insurance committees and insurers, on top of providing more understanding of Saudi insurance laws where information is scarce. It can also create a better understanding of the Islamic/cooperative insurance model adopted in Saudi Arabia and its differences from other countries adopting the same model.

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Malaysian Takaful Act 1984

Norwegian Insurance Contracts Act 1989

Swedish Insurance Contracts Act of 2005

US Uniform Commercial Code

US Restatement (Second) of Contracts

Academic Thesis: Declaration Of Authorship

I, Arwa Ibrahim A Aljallal.....

declare that the thesis entitled **THE DUTY OF GOOD FAITH IN INSURANCE LAW: A STUDY OF SAUDI LAW COMPARED TO ENGLISH LAW**..... and the work presented in it are my own and has been generated by me as the result of my own original research.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. Parts of this work have been published as

Aljallal A., 'The Application of the Duty of Good Faith in Insurance law : A Comparative Study between English and Saudi Laws' (Saudi Scientific International Conference Proceeding Book, Saudi Scientific International Conference, London, Oct 2012) found in <http://issuu.com/aahariri/docs/sic2012proceedings> accessed in 21/5/2014

Aljallal A., 'The Duty Of Good Faith Between English And Islamic General Contract Laws' (IGLRC, London April 2013)

Signed:

.....

Date:

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LIST OF ABBREVIATIONS

AFR2008	Anti-Fraud Regulation 2008
BDSC	Banking Disputes Settlement Committee
CCL1931	Commercial Court Law 1931
CIA2012	Consumer Insurance (Disclosure and Representations) Act 2012
CIB2011	Consumer Insurance (Disclosure and Representations) Bill 2011
COMP	Compensation
CMA	Competition Market Authority
DISP	Dispute Resolution: Complaints
GCC	Gulf Cooperation Council
ECJ	European Court of Justice
FCA	Financial Conduct Authority
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
FSCS	Financial Services Compensation Scheme
FSMA2000	Financial Services and Market Act 2000
IAC	Insurance Appeal Committee
ICC	Institute Cargo Clause
ICOBS	Insurance Conduct of Business Source book
IMCOCR2008	Insurance Market Code of Conduct Regulation 2008

IP 6	The Law Commission and Scottish Law Commission, <i>Damages for Late Payment and the Insurer's Duty of Good Faith</i> (Issues Paper 6, 2010)
IP 7	The Law Commissions and Scottish Law Commission, <i>Reforming Insurance Contract Law: The Insured's Post-Contract Duty of Good Faith</i> (Issue Paper 7, 2010)
IMD	Insurance Mediation Directive
IVDRC	Insurance Violations and Dispute Resolution Committee
JL2007	Judiciary Law 2007
LCCIL2009	The Law Commission and Scottish Law Commission, <i>Consumer Insurance Law: pre-contract disclosure and misrepresentation</i> (Law Com No 319, Scot Law Com No 219, 2009)
LCCP2007	The Law Commission and Scottish Law Commission, <i>Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured</i> (Law Com CP No182, Scot Law Com DP No 134, 2007)
LCCP2011	The Law Commission and Scottish Law Commission, <i>Insurance Contract Law: Post Contract Duties and Other Issues, A Joint Consultation Paper</i> (Law Com CP No 201, Scot Law Com DP No 152, 2011)
LCCP2012	The Law Commission and Scottish Law Commission, <i>The Business Insured's Duty of Disclosure and the Law of Warranties: Joint Consultation</i> (Law Com CP No 204, Scot Law Com DP No 155, 2012)
LSCIC2003	Law on Supervision of Cooperative Insurance Companies 2003
MIA1906	Marine Insurance Act 1906
MIPRU	Prudential Sourcebook for Mortgage and Home Finance Firms, and Insurance Intermediaries
NCCI	National Company for Cooperative Insurance
OFT	Office of Fair Trading

PEICL	Principles of European Insurance Contract Laws
PERG	Perimeter Guidance Manual
RII2011	Regulation for Insurance Intermediaries 2011
SAMA	Saudi Arabian Monetary Agency
SYSC	Senior Management Arrangements, Systems and Controls Sourcebook
UCMIP	Uniform Compulsory Motor Insurance Policy
UCTA1977	Unfair Contract Terms Act 1977
UTCCR1999	Unfair Terms in Consumer Contracts Regulations 1999

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

Like any other industry, insurance cannot operate efficiently and fairly unless clearly regulated and organised by state laws and regulations.¹ In fact, insurance is an important financial and economic sector in any country, which adds even more weight to the need for a set of strict regulations and laws for both ends of the insurance operation.² Insurers need those laws to be able to operate within certain standards maintaining the interest of the public. At the same time, assureds need those laws, since they alert them of their obligations and protect them against any violation or exploitation.³ The duty of good faith as a significant legal principle in insurance contracts experiences many problems in its application, by assureds and insurers.⁴ Those problems can relate to poor comprehension of the concept of the duty, its limits, or the consequences of breaching it.⁵ This in turn led to an increased amount of

¹ N. Feetham, *A Guide to Insurance: Combining Governance, Compliance and Regulation* (Spiramus Press Ltd 2012) 4-8 ; K. Meier, *The Political Economy of Regulation: The Case of Insurance* (SUNY Press 1988) 33

² Ibid.

³ Ibid.

⁴ See below.

⁵ For example, in business insurance, the Mactavich Group found that 87% of insurance buyers did not know the extent of the burden of the duty, while 65% do not review information provided to insurers. From the revision of 100 cases, it was found that material information is often not provided properly, with the same errors repeated in most cases; see Mactavish, *Corporate Risk & Insurance – The Case for Placement Reform*, The Mactavish Protocols (Mactavish 2011) found in <http://www.ukmediacentre.pwc.com/imagelibrary/downloadMedia.ashx?MediaDetailsID=1890> accessed 20 May 2012; see The Law Commission and Scottish Law Commission, *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties: Joint Consultation* (Law Com CP No 204, Scot Law Com DP No 155, 2012) (LCCP 2012) paras 4.29–4.37.

litigation, consuming more time and money.⁶ Such problems must be taken seriously in light of the decreased role of brokers in performing the duty and providing proper presentations of the risk.⁷

In addition, the harsh consequences of breaching the duty, which may reach to invalidating the whole insurance cover, can be unfair to innocent assureds.⁸ Insurers, on the other hand, may not realise that this duty is mutual, meaning that they are required to perform their obligations in the contract with good faith too. Such a situation can be justified, at least under

⁶ There is a high number of reported cases regarding issues of non-disclosure and misrepresentation. For business insurance for example, there were 41 reported cases between 2010 and 2012. Also, 30% of Airmic members (the Risk Managers Association, which usually buy insurance on behalf of large companies) in 2010 stated that they were faced with insurers challenging them regarding those issues in the last five years; See Airmic, *Non-Disclosure of Material Information - Member Survey* (Airmic 12 March 2010) found in <<http://www.airmic.com/research/survey/non-disclosure-material-information-member-survey-2010>> accessed 21 Dec 2010; See LCCP 2012 paras 4.25–4.28. Regarding Saudi Arabia, it has been observed by the Insurance Dispute Resolution Committee (IVDRC), which is responsible for reviewing insurance cases, that the number of cases containing a violation of the duty of good faith principle is considered ‘high’ and is mostly done by the assureds; Interview with Insurance Dispute Resolution Committee (IVDRC) members, IVDRC (Saudi Arabia, 9 January 2013).

⁷ The fees of brokers were decreased dramatically in 2010, by 30% compared to 2007 according to the Mactavish Group report. This means brokers will have less time to examine the risk and present it properly to insurers; See Mactavish, *Corporate Risk & Insurance – The Case for Placement Reform*, The Mactavish Protocols (Mactavish 2011) found in <<http://www.ukmediacentre.pwc.com/imagelibrary/downloadMedia.ashx?MediaDetailsID=1890>> accessed 20 May, 2012 ; See LCCP 2012 paras 4.38–4.41.

⁸ English Marine Insurance Act 1906 (MIA1906), s 17; See The Law Commission and Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* (Law Com CP No182, Scot Law Com DP No 134, 2007) (LCCP2007).

the English Marine Insurance Act 1906 (MIA1906), where the only remedy for breaching good faith is avoidance.⁹ Hence, there is a need for clarification of the duty to all industry players as well as for developing its approach towards a more fair and satisfactory result, and for supporting the judicial and enforcement systems in their application of the duty.

In this thesis, the issue of good faith as an important cornerstone of the insurance contract will be explored, and two legal systems compared, namely the English and Saudi legal systems. The research will examine the mutual duties of the insurer and the assured in good faith, honest representation, and disclosure, in a comparative analysis between English insurance laws, taking into account the latest proposals of the Law Commissions and the Consumer Insurance (Disclosure and Representations) Act 2012 (CIA2012)¹⁰, and the Saudi, relatively new, insurance laws, adopted under the umbrella of *Sharia'a* as a prevailing legal system.¹¹ When the work was finalised in March 2014, the second set of the draft clauses for the forthcoming Insurance Contract Law Draft Bill were issued by the Law Commissions, while

⁹ Ibid.

¹⁰ The CIA2012 was given the Royal Assent on the 8th of March, and came into effect on the 6th of April 2013 (Commencement order 2012, SI 2013/450).

¹¹ The first official comprehensive insurance law regulating the insurance business (disregarding the old Commercial Court 1931) is the 'Law On Supervision of Cooperative Insurance Companies' (LSCIC2003) By the Royal Decree M/32 dated 1/8/2003; See <http://www.sama.gov.sa/sites/SAMAEN/Insurance/InsuranceLib/4600_C_InsuraLaw_En_2005_08_17_V1.pdf> accessed 28 August 2009; See also the LSCIC2003 Implementing Regulations are promulgated by the decision by the Minister of Finance No 569/1 dated 21/4/2004; See <http://www.sama.gov.sa/sites/SAMAEN/Insurance/InsuranceLib/4600_C_ReguExecutive_En_2005_08_18_V1.pdf> accessed 28 August 2009.

the first set of draft clauses were issued in January.¹² The work mainly considers the situation before the draft clauses and the forthcoming Bill, even though the draft clauses are eventually incorporated for purposes of completion.

The purpose for such comparison is mainly to develop a logical approach for Saudi insurance laws towards dealing with the duty of good faith in insurance contracts, regarding its concept, limits and remedies and its application to intermediaries, with a general consideration for protecting policy holders and balancing the interests of insurers. Further, the comparison aims to provide recommendations for Saudi insurance regulators and legislators regarding the duty and its remedies. Saudi Arabia, as a newcomer, needs such recommendations as an added insight to what is going to other parts in the world in that respect and a rich English experience can provide a learning model. England, on the other hand, is reforming its dated insurance laws and thus recommendations can be a useful source to bear in mind for proposed reforms or future cases.

The thesis is divided into eight chapters. This chapter, which is the first, will provide an overview of the research, review the literature in the area, and indicate the significance of such a study. Also, it will formulate the research problem, aims, objectives and questions, followed by its methodology. The second chapter will investigate the insurance contract from an Islamic law perspective. This will offer an adequate basis to comprehend the Saudi insurance legal system, which only allows the Islamic model of insurance to be practised in the country, and will give an overview of the arguments of Islamic scholars surrounding insurance. The third chapter will consider insurance in Saudi Arabia, in terms of the market, history, and regulation. Such a chapter is important to understand the influence of those factors on the current insurance laws and regulations in Saudi Arabia and on the duty of good

¹² For draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm> > accessed in 28 March 2014.

faith in particular. The fourth chapter will explore the concept of duty of good faith in English and Saudi general contract laws. This gives an insight into the origin of the duty and how deep the concept is rooted in contract laws in general in both legal systems. After that, the concept and limits of the duty of good faith, honest representation and disclosure will be discussed thoroughly, in both English and Saudi insurance laws, which will constitute the fifth chapter of the study. That will be followed by the sixth chapter, which will review the role of intermediaries in performing the duty of good faith in Saudi and English insurance laws. Such revision is crucial given the important role of brokers in conducting the insurance operation especially in England. The remedies for breaching the duty of good faith in insurance contracts will be analysed from the perspective of English and Saudi insurance laws in the seventh chapter. Finally, overall conclusions and recommendations will be highlighted in the last chapter of the thesis, the eighth chapter. The recommendations are directed to develop a reasonable approach for Saudi insurance laws to deal with the duty regarding its concept, limits, remedies, and its application to brokers, with a general consideration for protecting policy holders.

1.2 LITERATURE REVIEW AND RESEARCH SIGNIFICANCE

There is abundant literature concerning the duty of good faith in English insurance laws.¹³ Some literature questions the need for the duty in the first place in insurance laws, as in Butcher's arguments.¹⁴ However, most literature criticises the harshness of the duty and its unsuitability to the new century and contemporary needs of the society.¹⁵ After the Law Commissions' proposals presented in the consultation paper published in 2007 concerning the pre-contractual duty of good faith, non-disclosure and misrepresentation¹⁶ (LCCP 2007), evaluations of those proposals and suggestions began to be produced in abundance. Soyer argued these proposals in business insurance¹⁷ and consumer insurance¹⁸ in detail. Merkin

¹³ R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010); J. Lowry, P. Rawling & R. Merkin, *Insurance Law: Doctrines and Principles* (3rd edn, Hart Publishing 2011); J. Birds, *Modern Insurance Law* (9th edn, Sweet & Maxwell 2013); M. Clarke, G. Burling & R. Purves, *The Law of Insurance Contracts* (6th edn, Informa 2009); P. Eggers, S. Picken, & P. Foss, *Good Faith and Insurance Contracts* (3rd edn, Informa 2010).

¹⁴ C. Butcher, 'Good faith in Insurance Law: A Redundant Concept?' (2008) 5 JBL 375.

¹⁵ For example see Sir A. Longmore, 'An Insurance Contracts Act for a New Century' [2001] LMCLQ 356; Sir A. Longmore, 'Good faith and Breach of Warranty: Are We Moving Forwards or Backwards?' [2004] LMCLQ 158.

¹⁶ The Law Commission and Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* (Law Com CP No182, Scot Law Com DP No 134, 2007).

¹⁷ B. Soyer, 'Reforming Pre-Contractual Information Duties in Business Insurance Contracts – One Reform Too Many?' (2009) 1 JBL 15.

¹⁸ B. Soyer, 'Reforming the Assured's Pre-Contractual Duty of Utmost Good Faith in Insurance Contracts for Consumers: Are the Law Commissions on the Right Track?' (2008) 5 JBL 385.

and Lowry discussed the insurance law reform project as a whole, and the distinction between consumer and business insurance.¹⁹ The reforms to the law relating to intermediaries and warranties are also considered.²⁰ After the Law Commissions' report produced in 2009 (LCCIL2009)²¹ Lowry addressed its proposed changes with a view of a unified regime.²² Swaby also argued the need for a legal reform.²³ It must be noted that the LCCIL2009 was introducing proposals for the draft bill of Consumer Insurance (Disclosure and Representations) which was issued later in 2011 (CIB2011),²⁴ and which then was later issued as the Consumer Insurance (Disclosure and Representations) Act in 2012 (CIA2012).²⁵

It is worth mentioning that another aspect of good faith that began to draw the attention of academics and critics is the post contractual duty of good faith owed by the insurer and the

¹⁹ R. Merkin & J. Lowry 'Reconstructing Insurance Law: The Law Commissions' Consultation Paper' (2007) 71 (1) MLR 95, 98-103; J. Lowry 'Redrawing the Parameters of Good Faith in Insurance Contracts' (2007) 60 (1) Current Legal Problems 338,354.

²⁰ Ibid,103-110.

²¹ The Law Commission and Scottish Law Commission, *Consumer Insurance Law: Pre-Contract Disclosure And Misrepresentation* (Law Com No 319, Scot Law Com No 219, 2009) (LCCIL2009)

²² J. Lowry, 'Whither the Duty of Good Faith in UK Insurance Contracts' (2009) 16 (1) Connecticut Insurance Law Journal 97,147.

²³ G. Swaby, 'Insurance Law: Fit for Purpose in the Twenty First Century?' (2010) 52 (1) IJLM 21, 26.

²⁴ Consumer Insurance (Disclosure and Representations) Bill HL (2010-12) 274

²⁵ The CIA2012 was given the Royal Assent on the 8th of March, and came into effect on the 6th of April 2013 (Commencement order 2012, SI 2013/450).

assured, or the ‘continuing duty of good faith’.²⁶ Insurers’ post contractual duty of good faith and the award of damages for late payment of claims were considered by Clarke,²⁷ Lowry & Rawling,²⁸ Alasady²⁹ and Ying,³⁰ while assureds’ fraudulent claims were argued by Lowry & Rawling³¹. After the publication of the Issue papers and the Law Commissions’ Consultation paper concerning the post contractual duty of good faith in 2011,³² assessments of the

²⁶ This happened after the “*Star Sea*” [2001] UKHL 1; [2003] 1 AC 469. ; see N. Hird, ‘Case Comment: The Star Sea – The Continuing Saga of Utmost Good Faith’ (2001) 311 JBL 314; B. Soyer, ‘Continuing Duty of Utmost Good Faith in Insurance Contracts: Still Alive?’ [2003] LMCLQ 39; H. Yeo, ‘Post-Contractual Good Faith – Change in Judicial Attitude?’ (2003) 66 (3) MLR 425; A. Naidoo & D. Oughton, ‘The Confused Post-Formation Duty of Good Faith in Insurance Law: from Refinement to Fragmentation to Elimination?’ [2005] JBL 346 ; A. Naidoo, ‘Post-Contractual Good Faith – A Further Change in Judicial Attitude’ (2005) 68 (3) MLR 464.

²⁷ M. Clarke, ‘Compensation for Failure to Pay Money Due: A “Blot on English common law Jurisprudence” Partly Removed’ (2008) 4 JBL 291.

²⁸ J. Lowry & P. Rawling, ‘Insurers, Claims and the Boundaries of Good Faith’ (2005) 68 MLR 82.

²⁹ J. Al-Asady, ‘Damages, Late Payment and Indemnity Insurance’ [2006] JBL 396.

³⁰ C. Ying, ‘Damages for Late payment of Insurance Claims’ (2006) 122 LQR 205.

³¹ J. Lowry & P. Rawlings, ‘Fraudulent Claims: Framing the Appropriate Remedy’ [2006] JBL 338.

³² The Law Commission and Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues, A Joint Consultation Paper* (Law Com CP No 201, Scot Law Com DP No 152, 2011) (LCCP 2011) ; The Law Commission and Scottish Law Commission, *Damages for Late Payment and the Insurer’s Duty of Good Faith* (Issues Paper 6, 2010) (IP6) ; The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: The Insured’s Post-Contract Duty of Good Faith* (Issue Paper 7, 2010) (IP7).

proposals took place.³³ Some considered damages as remedies for late payment by insurers,³⁴ while others' assessments considered fraudulent claims by assureds.³⁵

When looking at the duty of good faith in insurance law from a comparative perspective, one can discern that there is not much up to date literature about the subject. Derrington evaluated the duty of good faith between Australian and English insurance laws on one hand and French and Norwegian insurance laws on the other.³⁶ Tarr and Tarr adopted a comparative approach of the duty of good faith among the Anglo Commonwealth countries, namely the UK, Singapore, New Zealand and Australia.³⁷ Furthermore, the duty of good faith between American and English marine insurance laws was compared by Schoenbaum back in 1998, where different aspects of the duty, e.g. sources, history, and tests of materiality, were

³³ R. Aikens, 'The Post-Contract Duty of Good Faith in Insurance Contracts: Is There a Problem That Needs a Solution?' (2010) 5 JBL 379.

³⁴ G. Swaby & P. Richards 'Insurance Reforms: Rebalancing the Kilter?' [2011] JBL 535, 547; J. Goodliff, 'Late Payment of Insurance Claims: A Legal or a Regulatory Issue?' (2011) 123 Journal of the British Insurance Law Association 23, 26; L. Mance, 'The 1906 Act, Common Law and Contract Clauses – All in Harmony?' [2011] LMCLQ 346, 350.

³⁵ G. Swaby, 'Insurance Law Reform: Deterring Fraud in the Twenty-First Century' (2011) 53 (6) International Journal of Law and Management 413, 427.

³⁶ S. Derrington, 'Non-Disclosure and Misrepresentation in Contracts of Marine Insurance: A Comparative Overview and Some Proposals for Unification' [2001] LMCLQ 66.

³⁷ A. Tarr & J. Tarr, 'The Insured's Non-Disclosure In The Formation Of Insurance Contracts: A Comparative Perspective' (2001) 50 (3) International and Comparative Law Quarterly 577.

discussed.³⁸ However, these studies were conducted before the new changes in English insurance laws and the proposed reforms regarding the duty of good faith. Hence, literature needs to be enriched with more up to date comparative material in this respect. Even on a European level, good faith in insurance law context was not tackled thoroughly. European Insurance laws in general were considered in *Compendium in insurance law*.³⁹ However, most studies were dated and concentrated on the harmonisation process and the creation of a single market, rather than critically examining the characteristics and peculiarities of each law of the member states.⁴⁰ Thus, doctrinal comparative studies are certainly needed between the English system and other legal systems.

Concerning the duty of good faith in Saudi insurance laws and regulations, one can easily say that the literature in this area is scarce. Until now, the new insurance laws and regulations in general were not subject to an intensive discussion in academic articles or books. All that are found are some comments from several parties of the insurance operation in the newspapers.⁴¹ *Saudi Shipping Law* by Andreas Haberbeck⁴² may be the only book published

³⁸ T. Schoenbaum, 'The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law' (1998) 29 (1) *Journal of Maritime Law and Commerce* 1.

³⁹ R. Merkin & Hjalmarsson, *Compendium in Insurance Law* (1st edn, Informa Law 2007) ; see also R. Merkin & A. Rodger, *EC Insurance Law* (1st edn, Longman 1997).

⁴⁰ M. Reichart, 'The EU Insurance Industry: Are we Heading for an Ideal Single Financial Services Market?' (2005) 30 (2) *The Geneva Papers on Risk and Insurance* 9 ; J. Basedow, 'The European Insurance Market, Harmonization of Insurance Contract Law, and Consumer Policy' (2001) 7 *Conn Ins LJ* 495 ; M. Sterzynski, 'The European Single Insurance Market: Overview and Impact of the Liberalization and Deregulation Processes' (2003) 3 (1) *Belgian Actuarial Bulletin* 42.

⁴¹ For example, F. Alanazi, 'Hal Asbab Tahrim Alta'amin Mantgyiah', *Aliqtsadiyah Newspaper* (Riyadh, 15 March 2010) <http://www.aleqt.com/2010/03/15/article_363842.html> accessed 13 Aug 2013 ;

in English tackling Saudi insurance laws. Nonetheless, it dates back to the 1990s and only tackles those laws *inter alia* Maritime law. In other words, it is not wholly dedicated to discussing insurance laws, and it does not follow the recent changes in Saudi insurance laws.

Based on the literature reviewed above, it is obvious that current study is worth conducting, as it can fill various gaps in the academic literature and add to knowledge in different aspects. Firstly, since the study considers the recent changes in English insurance laws and specifically the pre and post contractual duties of good faith, non-disclosure and misrepresentation, it can be an informative source to keep pace with those changes and provide insight for further scrutiny and analysis of the subject.

Secondly, such research can be a valuable source to find about Saudi insurance laws, where the research gap is huge. It must be remembered that there are no up to date sources about Saudi insurance laws and regulations, even in Arabic. Accordingly, such a study can benefit not only the English speaking world, but also the Arabic speaking world, since it deals with new changes in laws in the country which have not been considered before.

Thirdly, from a comparative standpoint, the research will be comparing the common law system presented by English insurance law and the *Sharia'a* law system as adopted in Saudi insurance laws and regulations. These legal models are different systems in their aspirations, principles and sources, and therefore the research can add to the knowledge of comparative law as well as insurance law. Furthermore, it must be remembered that when comparing English law with Saudi law we are actually comparing it with the Islamic approach in

F. Alanazi , 'Ma'ogāt Qda'a Altamin fe Almmmlkah' *Alriyadh newspaper* (Riyadh, 10 July 2010)

<http://www.aleqt.com/2010/07/12/article_417928.html?related> accessed 12 June 2012 ; Algamdi E, 'Nitham Alt'amin Wa Aqd Atam'min' *Alriyadh newspaper* (Riyadh 10 Dec 2005)

<<http://www.alriyadh.com/2005/12/10/article114324.html>> accessed 24 May 2012.

⁴² A. Haberbeck & M. Galloway, *Saudi Shipping Law* (Fairplay Publications 1990).

interpretation of insurance and the duty of good faith, which influences other Islamic countries in other regions, e.g. Malaysia and the GCC countries⁴³. Therefore, the study can create a better understanding of insurance laws in those countries, which can have a positive effect on their market position and on attracting foreign investments.

In other aspects, given the harsh consequences of breaching good faith, and since the conception of the duty and materiality may change by recent cases, the research can be a very useful source to review and analyse the recent case law in that area to stand on the recent changes. It must be remembered that the duty of good faith in insurance has not been clarified yet in Saudi laws, due to its recent adoption. Therefore, research in these areas can clarify such important duty to Saudi consumers, law practitioners, judges, arbitrators and investors in insurance.

⁴³ Which is short for Gulf Corporation Council and it includes Kuwait, the United Arab Emirates, Qatar, Oman and Saudi Arabia.

1.3 RESEARCH PROBLEM, AIMS, OBJECTIVES AND QUESTIONS

The main problem is that the duty of good faith in Saudi insurance laws is not clear whether with regard to its concept, limits, and remedies or to its application to intermediaries, with many legal gaps surrounding its application.⁴⁴ It was indicated that the number of cases which contain a violation of the duty of good faith principle is considered ‘high’ and it is mostly done by the assureds.⁴⁵ On the other hand, the consequences of breaching the duty of good faith may have serious effects on the insurance cover and the liability of the parties. Hence, there is a need for clarifying the duty as a whole to the parties, legal practitioners, judges, and insurance committees in charge of viewing insurance cases to make it more comprehensible and understandable. For the insurance parties, more comprehension is needed to be able to comply with the duty, while for judges or insurance committees, clarity is needed to be able to apply the principles on the cases correctly, taking into account that the enforcement and judicial system lack experience in insurance cases due to the late official recognition of insurance as a transaction and the relatively recent promulgation of insurance laws and regulations.⁴⁶ It must be borne in mind that Islamic law’s suspicion towards

⁴⁴ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

⁴⁵ Ibid.

⁴⁶ The first official comprehensive insurance law regulating the insurance business (disregarding the old Commercial Court 1931) is the ‘Law On Supervision of Cooperative Insurance Companies’ (LSCIC2003) By the Royal Decree M/32 dated 1/8/2003; See <http://www.sama.gov.sa/sites/SAMAEN/Insurance/InsuranceLib/4600_C_InsuraLaw_En_2005_08_17_V1.pdf> accessed 28 August 2009.; See also the LSCIC2003 Implementing Regulations are promulgated by the decision by the Minister of Finance No 569/1 dated 21/4/2004; See <http://www.sama.gov.sa/sites/SAMAEN/Insurance/InsuranceLib/4600_C_ReguExecutive_En_2005_08_18_V1.pdf> accessed 28 August 2009.

accepting insurance as a contract ⁴⁷ led to its practice in Saudi Arabia without official recognition, laws, or regulations for a long time, and the effects were disastrous on the assureds and on the industry.⁴⁸ Commercial or conventional insurance was forbidden in Saudi Arabia by ‘*Haiat Kibar Alulma*’ in its ‘*fatwa*’ in 1977,⁴⁹ which permitted only cooperative insurance, and the first comprehensive insurance law regulating the insurance business was not promulgated until 2003, and indicated that only cooperative insurance was to be practised there.⁵⁰

In addition, there is a need to provide recommendations for developing the approach of Saudi insurance laws and regulations in general, and regarding the duty of good faith specifically, considering the various legal gaps in the current laws and regulations. Such recommendations can guide regulators and policy makers in clarifying the laws and regulations towards a more comprehensive and fair approach, besides adding greater certainty and predictability, and eliminating discretion and arbitrary judgments. Also, it can guide the insurance committees when viewing insurance cases, as they are forced to deal with such legal gaps with no clear guidance. It is worth mentioning that the Insurance Violation and Dispute Resolution

⁴⁷ The main arguments in Islamic law against insurance are *gharar* (uncertainty), *riba* (usury) and gambling; See Ch 2.

⁴⁸ See Ch 3 for more.

⁴⁹ *Haiat Kibar Alulma* is a supreme body of *Sharia*’a jurists in Saudi Arabia. *Fatwa* is the opinion of this body which is highly considered by the Saudi Arabian judiciary; See decision No 55, 10th session in 25/3/1977. The prohibition of conventional insurance and the admissibility of cooperative insurance was also affirmed by the International Islamic Fiqh Academy, decision No 9 (2/9), Jeddah, 22-28 Dec 1985, published in 2 (2) *Majalt Almajma’a* 545 and its opinion is highly respected in Saudi Arabia; See A. Haberbeck, ‘Insurance Under Saudi Arabian Laws’ [1986] LMCLQ 246.

⁵⁰ Art 1 LSCIC2003

Committee in charge of viewing insurance cases in Saudi Arabia in the first instance (IVDRC) ⁵¹ stressed such need for clarity and guidance regarding the current insurance laws and regulations and specifically with regard to the duty of good faith.⁵² The English experience as an international hub for insurance and reinsurance can provide valuable guidance to develop Saudi insurance laws and regulations in that regard, especially since the Marine Insurance Act 1906 (MIA1906) and the Financial Services Market Act 2000 (FSMA2000) were used as a source of inspiration and guidance when drafting Saudi insurance laws in the first place.⁵³

Hence, based on the research problem several questions have emerged:

1. What is the view of Islamic law as applied in Saudi Arabia as regards insurance as a contract, and what are the main arguments against its admissibility?
2. How was insurance regulated, conducted and enforced in Saudi Arabia before and after the LSCIC 2003 and its implementing regulations?
3. To what extent does the duty of good faith, honest representation and disclosure exist in English general contract law, and in Islamic law, as the general contract law in Saudi Arabia?
4. What are the concepts and limits of the duty of good faith in English and Saudi insurance laws and regulations?

⁵¹ Art 20 LSCIC2003.

⁵² Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

⁵³ E. Algamdi, 'Nitham alt'amin wa aqd atam'min' *Alriyadh* (Riyadh 10 Dec 2005) <<http://www.alriyadh.com/2005/12/10/article114324.html>> accessed 24 May 2012

5. To what extent is the duty of good faith required by insurance intermediaries in both English and Saudi insurance laws?
6. What are the legal remedies for breaching the duty of good faith, or in cases of misrepresentation or non-disclosure in insurance contracts in English and Saudi insurance laws and regulations?

This study aims to provide a solid comparative analysis between Saudi and English insurance laws in the area concerning good faith, honest representation and disclosure between the parties of the insurance contract. The purpose behind the comparison is to develop recommendations for the approach of Saudi insurance law in general and for dealing with the duty of good faith in particular, using English insurance laws as an illustration and a learning model. Hence, the objectives of the study are formulated to serve this general aim as follows:

Firstly, to provide an analysis of the insurance contract from an Islamic law perspective, and discuss the main arguments raised by Islamic scholars, against its admissibility.

Secondly, to provide a conceptual background for the comparison by describing the insurance market and the legal environment in Saudi Arabia before and after the ‘Law On Supervision of Cooperative Insurance Companies’ promulgated in 2003 (LSCIC2003)⁵⁴, along with its implementing regulations published in 2004.⁵⁵

⁵⁴ By the Royal Decree M/32 dated 1/8/2003; See

<http://www.sama.gov.sa/sites/SAMAEN/Insurance/InssuranceLib/4600_C_InsuraLaw_En_2005_08_17_V1.pdf> accessed 28 August 2009.

⁵⁵ The implementing regulations are promulgated by the decision by the Minister of Finance No 569/1 dated 21/4/2004; See <http://www.sama.gov.sa/sites/SAMAEN/Insurance/InssuranceLib/4600_C_ReguExecutive_En_2005_08_18_V1.pdf> accessed 28 August 2009.

Thirdly, to critically compare the duty of good faith, misrepresentation and non-disclosure in the general contract laws within the two systems; this is Islamic law in the Saudi scene.

Fourthly, to provide an in-depth evaluation of the concept and limits of the duty of good faith in insurance laws in both systems.

Fifthly, to analyse the role played by the intermediaries in performing the duty of good faith in both English and Saudi insurance laws.

Sixthly, to examine the remedies for breaching the duty of good faith or cases of misrepresentation and non-disclosure in both English and Saudi insurance laws.

Finally, to develop an overall recommendation for Saudi insurance laws and regulations in order to move towards a fairer and more comprehensive approach.

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1.4 METHODOLOGY

The current research is a doctrinal study as it mainly investigates the insurance laws in England and Saudi Arabia relating to the duty of good faith and analyses them. Doctrinal or theoretical legal research examines the law in a certain area, and can involve deep analysis of judicial reasoning and legislation.⁵⁶ The researcher takes a legal principle or doctrine, then uses a holistic approach to collect the data from case law, legislation, status, treatise, academic articles, books, etc. to analyse it and see how it was developed and practised.⁵⁷ It aims to assist legal professionals such as judges and lawyers in performing their tasks.⁵⁸

Further, the study employs an exploratory design as it serves the purpose of the research by getting primary information about Saudi insurance laws regarding good faith to be able to define problems surrounding them and explain them.⁵⁹ It must be noted that there is insufficient knowledge about the duty of good faith in insurance law in Saudi Arabia, and therefore the author aims to explore the subject to be familiar with its elements and provide more insight, and then compare it to the English system.⁶⁰

As the main purpose of the study is to improve and develop recommendations for Saudi insurance law based on the experience of English insurance law regarding the duty of good faith, honest representation and disclosure, the study employs a comparative law

⁵⁶ I. Dobinson & F. Johns, 'Qualitative Legal Research' in M. McConville & W. Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 16,18.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Kidder, L, *Selltiz, Wrightsman, and Cook's Research Methods in Social Relations* (Holt 1981) 15.

⁶⁰ Ibid.

methodology. It provides a conceptual comparison between English and Saudi insurance laws regarding the duty of good faith, honest representation and disclosure, in order to reach the purpose and the objectives of the study. The comparative method allows promoting awareness of the law, taking into consideration the cultural and social dimensions to help comprehend the practice and development of law in various cultures.⁶¹ Bryce describes that it:

*“...collects, examines, collates the notions, doctrines, rules and institutions, which are found in every developed legal system, or at least in most systems, notes the point in which they agree or differ and seeks thereby to construct a system, which shall be natural...because it shows what particular means the ends, which all or most systems pursue have been best attained”*⁶²

Even though there are several functions of comparative law methodology, using it as a guide for creating legislations and reforming existing laws and regulations may be the most dominant function behind employing such methodology, as Maine indicated:

*“The chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of the law.”*⁶³

Accordingly, the current study uses such methodology mainly for developing recommendations for the newly articulated Saudi insurance laws by reviewing the more experienced English insurance law. However, suggestions for English insurance laws are also

⁶¹ D. Walker, *The Scottish Legal System: An Introduction to the Study of Scots Law* (8th edn, Sweet & Maxwell 2001) 55.

⁶² J. Bryce, *Studies in History and Jurisprudence* (Forgotten Books 2012) 186.

⁶³ H. Maine, *Village-Communities in the East and West* (Henry Holt 1889) 4.

given eventually, based on a logical analysis to protect assureds, especially given that English law is in the process of reformation. From that comparison, the Saudi legal system would benefit from having an insight into not only what aspects of law to adopt, but also which to avoid when solving a particular problem.⁶⁴ Developing countries such as Saudi Arabia tend to utilise foreign legal experiences to meet the contemporary needs of their societies.⁶⁵ Also, developed countries such as the UK use such methods to reform their laws and regulations and to look for better approaches to deal with legal problems.⁶⁶ For example, in the course of reviewing the pre-contractual disclosure and misrepresentation in insurance laws, the English and Scottish Law Commissions looked at the experiences in many countries, whether civil law countries, e.g. France, Germany, and Norway, or common law countries, e.g. Australia and New Zealand.⁶⁷

Gordley argues that the law of a single state cannot be a subject of an independent study. If the problem requiring a solution is transnational, then one must look beyond one's national law, even though those national laws tend to have individual solutions.⁶⁸ The problems relating to good faith, disclosure, and representation in insurance contracts can be experienced in almost all countries. Often assureds do not really understand the concept of good faith and

⁶⁴ D. Tallon, 'Comparative Law: Expanding Horizons' (1969) 10 JSPTL 265, 266.

⁶⁵ W Kamba, 'Comparative law a Theoretical Framework' (1974) 23 (3) Int'l & Comp LQ 485, 496.

⁶⁶ Ibid.

⁶⁷ See for example, the LCCP2007, LCCP2012.

⁶⁸ J. Gordley, 'Comparative Legal Research: Its Function in the Development of Harmonized Law' (1995) 43 (4) Am J Comp L 555.

its value in validating their cover to be able to comply with it.⁶⁹ Also, insurers vary in applying good faith in their relationship with assureds. Hence, such an international problem requires us to compare solutions offered by different systems, and in the study English and Saudi laws are chosen to be able to understand the problem, even within one's national dimension.

The choice of comparing English insurance law to Saudi insurance law can be justified. The wealth of the English experience and its history in the insurance industry, together with its position as a leader and a centre of insurance and reinsurance in the world has attracted international attention and interest in its insurance laws, and provided the enforcement and judicial systems with experience in dealing with insurance cases and in the application of insurance laws. Saudi Arabia as a country with new experience in regulating insurance looked at the English legal experience as an inspiration in regulating insurance, despite many pitfalls in its protection of assureds.⁷⁰ However, it took into consideration that only the cooperative or Islamic model of insurance is allowed in the country.⁷¹ Both systems are prototypes; English law is a prototype of a common law country, while Saudi law represents a prototype of an Islamic law country. Hence, the results which will be generated from the research can apply to wider variety of Islamic countries, such as Malaysia, Indonesia, Pakistan, Egypt, etc. A prototypical case plays an illustrative role among other cases, as it consists of relevant akin

⁶⁹ See above under 1.1.

⁷⁰ See below.

⁷¹ Art 1 LSCIC2003.

features. It often passes stronger theories and provides stronger evidence to other analogous cases.⁷²

In addition, English insurance laws, and specifically the Marine Insurance Act 1906 (MIA1906) and the Financial Services and Market Act 2000 (FSMA2000), were employed as a model to the legislators in Saudi Arabia in the course of drafting the LSCIC2003 and its regulations and to the insurance committees reviewing insurance cases.⁷³ It is often said that it is best to trace the law of a foreign origin in its natural habitat to be able to understand it within the socio economic conditions surrounding it and according to its practice by courts of origin.⁷⁴ Hence, the choice of English insurance laws is natural. Examining English insurance laws comparatively will enhance the comprehension and acquaintance of the law and its application, which in its turn will improve the understanding and realisation of Saudi insurance laws and their application in courts and legal committees. The comparative methodology and the current comparison specifically are justified to help regulators to clarify the law and to serve the judicial process and support Saudi courts in filling legal gaps.⁷⁵ It must be borne in mind that Saudi Arabia is a country which relies on codes regarding

⁷² R. Hirschl, 'The Questions of Case Selection in Comparative Constitutional Law' (2005) 53 (1) *The American Journal of Comparative Law* 125,142.

⁷³ The FSMA2000 was used in drafting the LSCIC2003 and its implementing regulations, while the MIA1906 was used by the IVDRC Committees in judging insurance cases; see E. Algamdi, 'Nitham alt'amin wa aqd atam'min' *Alriyadh* (Riyadh 10 Dec 2005) <<http://www.alriyadh.com/2005/12/10/article114324.html>> accessed 24 May 2012 ; see Ch 3 for more.

⁷⁴ U.Mattie, T. Ruskola, & A. Gidi '*Schlesinger's Comparative Law Cases-Text Materials* (7th edn, Foundation Press 2009) 262-270.

⁷⁵ See W. Kamba, 'Comparative Law a Theoretical Framework' (1974) 23 (3) *Int'l & Comp LQ* 485, 496.

commercial cases, and courts and committees can face various legal gaps. Therefore, the English experience, as a common law system where courts ‘make the law’ by precedents, can be a precious source for the Saudi courts and legal committees. England, on the other hand, can benefit also from looking at how their rules are adopted in other environments, how they are enhanced, and how other systems escape from unfair or impractical solutions provided in the development and reform of their own laws.

It is interesting to note that Islamic law and Saudi insurance laws and regulations are not terms which fully stand for the same concept. Like all laws in Saudi Arabia, insurance law must be compatible with Islamic law as applied in the country, and as the supreme law of the land.⁷⁶ However, as it will be pointed out later, there are several cases where there are clear contradictions between Islamic principles on one hand and insurance laws on the other, to the extent that it is impossible that they can operate together or be versions of the same principles.⁷⁷ The current study occasionally indicates the legal pluralism in Saudi Arabia resulting from the operation of Islamic law on one hand and the ‘man-made’ commercial codes on the other.⁷⁸ This occasional comparison facilitates the unification of laws and creating a single system within the country, that in its turn positively affects the understanding of Saudi insurance laws from an international perspective.⁷⁹

⁷⁶ See Ch 3 ‘Insurance in Saudi Arabia’; Saudi Arabia applies Islamic law according to the *Hanbali* school of Islamic law.

⁷⁷ Ibid.

⁷⁸ Particularly in Ch 3.

⁷⁹ See W. Kamba, ‘Comparative Law a Theoretical Framework’ (1974) 23 (3) Int'l & Comp LQ 485, 496.

The study attempts to reach its purpose and aim by collecting data from primary and secondary sources. Primary data include legislations, court reports, judicial commentaries, case law, interviews, and law commissions' reports.⁸⁰ Secondary data include books, journals, and conference proceedings.⁸¹ Moreover, the author's own opinions, reflections and analysis are employed throughout the thesis.⁸² As the study adopts a doctrinal approach, the author will analyse all data gathered, including legal doctrines, status, and case law, using relevant legal theories and principles.⁸³ Also, the author will select relevant judicial dicta to articulate and deduct legal principles from judicial decisions and explain legal concepts, after which the author will compare these elements within in the legal systems under examination and assess their similarities and differences. All material will be organised and analysed in a logical and coherent approach.

After reviewing the literature regarding the subject and emphasising the significance of the research and methodology, the study will begin by giving an overview of insurance in Islam. Such an overview is important to explain the hesitance of *Sharia'a* law towards regulating insurance officially in Saudi Arabia which has its effect on the approach to insurance laws and regulations in the country and the duty of good faith in particular.

⁸⁰ I. Dobinson & F. Johns, 'Qualitative Legal Research' in M. McConville & W. Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 16,18.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

CHAPTER 2

INSURANCE IN ISLAM

2.1 INTRODUCTION

Insurance as an economical phenomenon in Europe was coined around the 13th century as a result of the prominence of the marine trade between Italy and other Mediterranean countries; however, it was not until the 19th century that insurance was observed in the Islamic world.⁸⁴ Therefore, it is fair to say that insurance as a financial transaction in its form today is considered a new financial transaction to the Islamic community. This late occurrence of insurance in Islam naturally justifies why insurance has not been under examination by ancient Islamic jurists in the early jurisprudence (*ijthad*) years. Ibn Abidin, who represents the *Hanafi* school of Islamic law⁸⁵, was the first Islamic Jurist who examined insurance under the term '*sukara*' (security or *sécurité*),⁸⁶ derived from the Italian term *siguare*⁸⁷ and the Turkish term *sigorta*.⁸⁸ Ibn Abidin's view on the *sukara contract* was based on the distinction between the marine insurance contract concluded in a non-Islamic country, which is a contract without a rule, and the marine insurance contract concluded in an Islamic country, which in his view

⁸⁴ Vardit Rispler-Chaim, 'Insurance and Semi-Insurance Transactions in Islamic History Until the 19th Century' (1991) 34 (3) *Journal of the Economic and Social History of the Orient* 142,143.

⁸⁵ There are four main schools of law in Islamic jurisprudence under the *Sunni* approach: *Hanafi*, *Shafai*, *Maliki* and *Hanbali*.

⁸⁶ E. Klingmuller, 'The Concept and Development of Insurance in Islamic Countries'(1969) 43 *Islamic Culture* 27, 30.

⁸⁷ Quoted in C .F. Trenerry, *The Origin and Early History of Insurance*, (P S King & Son 1926) 107, as an early Italian term for marine insurance.

⁸⁸ The word means 'insurance'. See: *The Oxford English Turkish Dictionary* (2nd edn, OUP 1978) 422 .

is void and unbinding.⁸⁹ As a justification for this view, he stated that the *sukara* contract constrains the person with obligations which he is not obliged to, according to *Sharia'a* law, and the *Hanafi* school specifically.⁹⁰ The insurer in his opinion is on the same footing as a borrower or a tenant who is bound by a term in the contract to bear the risk of the goods they borrowed or rented.⁹¹ According to the *Hanafi* school, if the borrowed or rented goods have been destroyed, without any fault or neglect from the borrower or the tenant, the term will not binding to them. Thus, in the same way, the term must not be binding to the insurer.⁹²

In the last five decades, insurance has been the centre of attention of many Islamic conferences⁹³ and much Islamic literature⁹⁴, due to its vast expansion in the Islamic world and its necessity to modern trade. The significance of the subject has resulted in a flourishing era of researches, books, and advisory opinions, and has produced a lush field for scrutiny

⁸⁹ Ibn Abidin, *Hashiyat Radd al-Muhtir*, vol 3 (2nd edn, Albabi Alhalbi Press 1966) 169 and onwards.

⁹⁰ Ibid.

⁹¹ Ibn Abidin, *Hashiyat Radd al-Muhtir*, vol 3 (2nd edn, Albabi Alhalbi Press 1966) 169 and onwards.

⁹² Ibid.

⁹³ For example, Islamic Jurists Week (Damascus, April, 1961), The Seventh Conference for Islamic Researches (Cairo, September, 1972), The First Conference of the Islamic Economy (Mecca, Feb, 1976) and the Insurance industry in the Islamic World Conference (Cairo, Jan, 2001).

⁹⁴ For example, A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfah Ilislame* (1st edn, Dar Nashr Althuaqafh 1967); M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983); S. Olyan, *Alt'amin Fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996); F. Abdulrahman, *Alta'min Fe Ilislam* (Dar Almtboa'at Aljamaia 2006).

and debate among Islamic Jurists on the legal rule of insurance under *Sharia'a* law.⁹⁵ In this debate, three main approaches can be perceived. The first approach strictly prohibits all kinds of insurance whether it is cooperative or commercial, viewing it as comprising elements which are not acceptable in any contract under Islamic law, namely: *gharar* (risk or uncertainty), *riba* (usury) and gambling.⁹⁶ It does not recognise any substantive difference between commercial and cooperative insurance, and therefore applies these claims to all kinds of insurance. Also, it views the charitable systems in Islam, such as *zakat*,⁹⁷ *waqaf* (endowment),⁹⁸ and *aqil*⁹⁹ as sufficient systems to play the role of security in society.¹⁰⁰ The

⁹⁵ For example, M. Alsaleh, *Altamin Baen Alahdr Wa Alibaha*, (1st edn, 2004); A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfah Islame* (1st edn, Dar Nashr Althuqafh 1967); M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983); S. Olyan, *Alt'amin fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996); F. Abdulrahman, *Alta'min Fe Ilislam* (Dar Almtboa'at Aljamaia 2006).

⁹⁶ For example, Ibn Abidin, *Hashiyat Radd al-Muhtir*, vol 3 (2nd edn, Albabi Alhalbi Press 1966) 169 and onwards ; M. Almutiei, *Ahkam Alskoratah* (Nile Press 1906) 12; A. Taj 'Shrakit Altamin Mn Wjht Nathar Alsharia'a' (The Seventh Conference for Islamic Researches, Cairo, September, 1972) ; M. Abuzahrah 'Altaleeg Ala Mothoa Agd Altamin' (Islamic Jurists Week, Damascus, April, 1961); S. Olyan, *Alt'amin fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996) 169-171.

⁹⁷ *Zakat* is the third pillar of Islam and it means redistribution of wealth in a manner that narrows the gaps between classes and groups, thereby contributing to social stability; see A. Korshaid, *Islamic Insurance: A Modern Approach to Islamic Banking* (Routledge Curzon 2004) 7.

⁹⁸ *Waqf* is the retention of a property that cannot be sold and assignment of the usufruct for the benefit of a charitable or a humanitarian objective or for a specified group of people, such as members of the donor's family; *ibid* 20.

⁹⁹ *Aqilah* is a group of people, often the tribe, who pays a sum of money, '*diyyah*' as compensation on behalf of a person who unintentionally killed or injured someone, often to prevent any retaliation on the part of the victim's family. However, it is without a contract; *ibid* 23.

second approach distinguished between types of insurance, and prohibited some types while allowing others. For instance, some scholars prohibited life insurance based on the *riba* argument but allowed other kinds of insurance,¹⁰¹ while other scholars permitted just car insurance amongst the other kinds¹⁰². However, the major distinction was between cooperative insurance¹⁰³ and commercial or conventional insurance. Many proponents of this approach have permitted cooperative but not commercial insurance¹⁰⁴, and even though they mainly admitted the assertions of *gharar*, and sometimes *riba*, they nonetheless believe that these can be used against consideration contracts only, represented in commercial insurance contracts. However, in donation contracts, as in cooperative insurance, these claims can be

¹⁰¹ For example, M. Alsunhuori, 'Altaminaat' (The Seventh Conference for Islamic researches, Cairo, September, 1972) ; M. Alhajaoi, *Alfikir Alsami Fe tareek Alfihq Alislame* (Dar Alkutb Alamia 1995) 504.

¹⁰² For example, M. Alsaleh, *Altamin Baen Alahdr Wa Alibaha*, (1st edn, 2004) 241; A. Almahmod, *Ugod Alta'amin Wa Makanaha Fe Sharea'at Aldeen* (3rd edn, Almaktab Alislami 1986) 53, included ships and airplanes, as well as factories and shops.

¹⁰³ In the literature, the word *takaful* is also used; however, the author did not opt for its use in this context as it was not used in Saudi laws and regulations.

¹⁰⁴ For example, M. Abuzaharah, 'Ugod Altamin' (1961) 5 Majlt Hathart Alislam 10, 22 ; A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfah Ilislame* (1st edn, Dar Nashr Althuqafh 1967) 646; International Islamic Fiqh Academy , decision No 9 (2/9) , Jeddah , 22-28 Dec 1985 , published in 2 (2) Majalt Almajma'a 545 (The international Islamic Fiqh Academy is a council consisting of scholars from different fields of knowledge from all over the Islamic world to study Islamic solutions for contemporary problems. It is part of the Islamic Conference Organization); This was also the view of *Haiat Kibar Alulma* (a supreme body of *Sharia'a* jurists in Saudi Arabia), decision No 55, 10th session, 25/3/1977; Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978 (Islamic Fiqh Academy has the same goals as the International Fiqh Islamic Academy , but it is part of the Muslim World League).

forgivable as a type of support for these contracts, and an encouragement for the cooperation between members of the society against the risks faced. The third approach allowed all types of insurance, whether commercial or cooperative, subject to certain conditions.¹⁰⁵ Its view was based on refuting the claims of *gharar*, *riba* and gambling in the insurance contract, which are the main claims of prohibition, or forgiving some of them for the public need. Also, their view was based on the doctrine of free interest and that Islam is not against creating new contracts since the original state of things is admissibility. Like the first approach, it does not recognise any substantial difference between commercial and cooperative insurance technically, but uses this claim to permit all kinds of insurance, both cooperative and commercial.

This chapter will contribute towards providing a background to the development of insurance in Islam and its hesitance in accepting it as a new financial transaction, discussing the main views of Islamic scholars on insurance and the related arguments. This is necessary to comprehend the effects of such views on the legal environment of insurance in Saudi Arabia and specifically on the duty of good faith, considering that *Sharia'a* law is applied as the supreme law of the land. Such background is important considering that Saudi law is the core system in this comparison, and therefore the factors affecting it are vital.

¹⁰⁵ For example, M. Abdu, 'Answers on Jawaz Almutharabah'(1931) 1 Majalt Alazhar 679, 690 ; A. Siam, 'Sharikat Altamin Wa hl Fe Alsharia'a Ma Yjeezha' (1932) 8 Majlt Almohamh Alshareia 689, 701; A. Khallaf, 'Altamin' (1954) 11 Majalat Loa'a Alislam 1, 8 ; A. Alkafif, 'Altamin'(The Second Conference for Islamic Researches, Cairo, May 1965), also published more recently in Majlat Alazhar, A. Alkafif, 'Altamin' (1996) 37 (1) Majlat Alazhar 40, 48; M. Mousa, *Alislam Mushkiltina Alhaderh* (Almaktb Alfani Llnasher 1958) 63; M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 143 ; E. Esaoi, 'Altamin Fe Alshria'a Wa Alganon' 4 (1) (1962) Majalt Alaloom Alqanonyah Wa Aaleqtisadyiah 197, 202; R. Almasri, *Alkatar Wa Altam'in : Hal Alta'min Altejari Ja'az Shra'an?* (1st edn, Dar Alkalam 2001) 91.

Firstly, the author will discuss the main claims of prohibition, namely, *gharar*, *riba* and gambling. Secondly, the distinction between cooperative and commercial insurance will be discussed, to comprehend the different views on their legal ruling. Finally, the doctrine of free interest and creating new contracts as claims of admissibility will be argued.

2.2 CLAIMS OF PROHIBITION

2.2.1 Gharar

I Definition

Islamic jurisprudence recognises the doctrine of *gharar* as one of the main constraints on the contract in Islam.¹⁰⁶ The literal meaning for the Arabic word *gharar* is broad and includes uncertainty, risk, delusion, and hazard that might lead to loss.¹⁰⁷ An exact translation will be misleading; therefore, the Arabic word will be used. *Gharar* refers to any contract with probable items, or which contains an element of uncertainty.¹⁰⁸ It can be classified into four categories: *gharar* in existence, in gaining, in amount and in time.¹⁰⁹ Ibn Qayyim Aljwazyah, an early Jurist, described it as a situation where the vendor is not in a position to hand the subject matter to the buyer.¹¹⁰ Alqurafi described it as when the seller sells a subject matter

¹⁰⁶ Abu Hurairah narrated: “*prophet (P.U.H) prohibited sales of ‘whatever a pebble thrown by the seller hits,’ and sales in which there is chance or risk (Gharar)*”; Y. Alnawwai, *Sahih Muslim With Malawi Explanation* (Kitab Albyoa’a, Dar Alsalaam 1996) 121, *Hadith* 1513.

¹⁰⁷ *Gharar* is broader than uncertainty; it covers all kinds of undue risk. So derivatives transactions, for example, are tainted by *gharar*, see N. Foster, ‘Islamic Commercial Law (II): An Overview. Some Principles and Rules’ (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) found in <http://www.indret.com/pdf/405_en.pdf> accessed 12 Dec 2010.

¹⁰⁸ See S. Alqarafi, *Anwar Albraq Fe Anwa’a Alfurooq*, vol 3 (Dar Alkutb Alalmiah 1998) 256 ; S. Aljawzyah, *I’lam-Al Muwaqqein*, vol 1 (Dar Alkutb Alalmiah 1991) 358 ; A. Alsunhori, *Masadir Alhaqq*, vol 3 (Ma’ahd Alderasat Alarbiah Alaliah 1967) 49.

¹⁰⁹ Ibid.

¹¹⁰ S. Aljawzyah, *I’lam-Al Muwaqqein*, vol 1 (Dar Alkutb Alalmiah 1991) 358.

which he cannot control, such as a fish in water.¹¹¹ Alsunhori added an element of lack of knowledge, ‘*jahl*’.¹¹² He stated that ‘*jahl*’ can create *gharar* in the following situations: when it is not known whether the subject matter exists, or if it exists, whether it can be handed over to the buyer, or if it affects the subject matter in its genus, characteristics, quantum, identity, or condition.¹¹³ Moreover, lack of knowledge, ‘*jahl*’, regarding the date of future performance or price, may create *gharar*.¹¹⁴ *Gharar* can also be denoted as the risk of not getting the consideration from one of the parties, or as the ignorance of one of the parties of the specifics of the contract, which amount the transaction to gambling or betting.¹¹⁵

In practice, nearly all commercial transactions contain an element of *gharar*. However, forbidden *gharar* must be material and in an excessive amount, as it can generate disputes between parties; for example, selling an unborn animal (*Habal-al-Habalah*).¹¹⁶ On the other hand, immaterial and slight *gharar* is forgivable, for example, selling a house though its foundations have not been seen, or renting a house for a month, where the month can be thirty days or thirty-one.¹¹⁷ Nevertheless, it is in the intermediate *gharar* where discrepancies

¹¹¹ S. Alqarafi, *Anwar Albroq Fe Anwa’a Alfurooq*, vol 3 (Dar Alkutb Alalmiah 1998) 256.

¹¹² A. Alsunhori, *Masadir Alhaqq*, vol 3 (Ma’ahd Alderasat Alarbiah Alaliah 1967) 49.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ M. Alzarga, *Nizam Alta’amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 49.

¹¹⁶ A. Albaji, *Al-Montaqa Sharh al-Muwatta’:(Anotations of Al-Muwatta)* (Sa’ada Press 1914) 197 ; M. Albukari, *Sahih Al-Bukhari* (Kitab Albyoa’a , Dar Ibn Katheer 1993) 754, *Hadith* 2036 ; Y. Alnawwai, *Sahih Muslim With Alnawwi Explanation* (Kitab Albyoa’a, Dar Alsalaam 1996) 122, *Hadith* 1514.

¹¹⁷ A. Albaji, *Al-Montaqa Sharh al-Muwatta’:(Anotations of Al-Muwatta)* (Sa’ada Press 1914) 197.

between jurists can be spotted.¹¹⁸ This can be examined, for example, in selling what is hidden in the ground, in selling at ‘market price’ without specifying the exact amount, and in the conditional sale (*Albaia’a Almualag*).¹¹⁹ In an attempt to lay down a measure for the amount of *gharar* involved, Albaji stated that:

*“Slight gharar is that from which hardly a contract is free, while excessive gharar is that which dominates the contract that it comes to characterize it.”*¹²⁰

However, it is believed that classifying a contract as a *gharar* contract is a subjective decision which is influenced by time, technology and individual preference.¹²¹

II Islamic Legal Source

In the *Quran*, there is no explicit prohibition of *gharar*; nevertheless, vanity and gambling are prohibited in many verses. For example, *“And do not eat up your property among yourselves for vanities, nor use it as bait for the judges.”*¹²²

These verses have been viewed as the *Quranic* base for prohibiting *gharar* even though the word *gharar* is not mentioned. On the other hand, prophet Mohammed (P.U.H.) explicitly prohibited *gharar* in *Sunnah*¹²³ and numerated some contracts which contain a *gharar*

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ A. Alsunhroi, *Masadir Alhaqq*, vol 3 (Ma’ahd Alderasat Alarbiah Alaliah 1967) 49.

¹²² The Holy *Quran*, *Surat Albagrah*, verse 188.

¹²³ *Sunnah* is the second source of *Sharia’a* law after the *Quran*; it refers to the deeds, utterances and unspoken approvals of the Prophet (can also be referred to as *Hadith*). It is considered as one of the cardinal principles of

element and thus, it is prohibited by *Sharia'a* law, e.g. the purchase of the unborn animal in the mother's womb.¹²⁴ The prophet (P.U.H.) has then permitted *salam* sale (contract of sale with advanced payment and future delivery), subject to certain conditions that eliminate the *gharar* element.¹²⁵ This was a response to the public interest and to facilitate trade and commerce. However, this permission was viewed by jurists as an exception to the general rule.¹²⁶ In the *salam* sale, the conditions required included a full description of the goods and a named date for delivery.¹²⁷ *Gharar* is also prohibited by the consensus of the Islamic Jurists, which is the third source of ruling, after the *Quran* and *Sunnah*, under *Sharia'a* law.¹²⁸

sale's law and the ground norm of all rules governing *gharar* contracts; See Y. Al-Alim, *Al-Maqasid Al-Ammah li'l Shari'ah Al-Islamiyyah* (Dar Al-Ketab Al-Arabi 1994) 415-520; The main *Hadith* on *Gharar* is what is narrated by Abu Hurairah "*prophet (P.U.H) prohibited sales of 'whatever a pebble thrown by the seller hits,' and sales in which there is chance or risk (Gharar)*"; Y. Alnawwai, *Sahih Muslim With Alnawwai Explanation* (Kitab Albyoa'a, Dar Alsalaam 1996) 121, *Hadith* 1513.

¹²⁴ Also the sale of the milk in the udder without measurement, the purchase of spoils of war prior to distribution and the purchase of the catch of a diver; See M. Albukari, *Sahih Al-Bukhari* (Kitab Albyoa'a, Dar Ibn Katheer 1993) 754, *Hadith* 2036; Y. Alnawwi, *Sahih Muslim With Alnawwi Explanation* (Kitab Albyoa'a, Dar Alsalaam 1996) 122, *Hadith* 1514.

¹²⁵ M. Albukari, *Sahih Al-Bukhari* (Kitab Alsalam, Dar Ibn Katheer 1993) 781, *Hadith* 2124.

¹²⁶ The general rule is that *gharar* sales including the sale of goods that are not yet in existence is not allowed, but exceptions are created for the public need as provided by *Sunnah*; M. Albukari, *Sahih Al-Bukhari* (Kitab Alsalam, Dar Ibn Katheer 1993) 781, *Hadith* 2124; M. Alhattab, *Moahib Aljaleel Fe Sharah Moktasar Khalil* (Kitab Alsalam, 3rd edn, Dar Alfikr 1992) 515.

¹²⁷ M. Albukari, *Sahih Al-Bukhari* (Kitab Alsalam, Dar Ibn Katheer 1993) 781, *Hadith* 2124; M. Alhattab, *Moahib Aljaleel Fe Sharah Moktasar Khalil* (Kitab Alsalam, 3rd edn, Dar Alfikr 1992) 515

¹²⁸ M. Alhattab, *Moahib Aljaleel Fe Sharah Moktasar Khalil* (Kitab Alsalam, 3rd edn, Dar Alfikr 1992) 515.

Nonetheless, there is a discrepancy regarding the level of *gharar* that amounts to prohibition, and its admissibility in donation contracts.¹²⁹

III *Gharar* And Insurance

Many scholars have agreed that an insurance contract comprises an excessive amount of *gharar* which renders it prohibited.¹³⁰ They argue that insurance contract consist not only of one kind of *gharar*, but all four kinds, which makes it certainly prohibited.¹³¹

Firstly, insurance consists of *gharar* in existence. The insurance sum is uncertain because of the uncertainty of the risk insured. This aleatory nature of the insurance contract is admitted by law scholars and insurance specialists, and believed to be a substantive element in the insurance contract.¹³²

Secondly, insurance contains *gharar* in gaining. This can be examined in insurance against damages, as the assured does not know at the time of the contract if he will obtain the

¹²⁹ Ibid.

¹³⁰ For example, A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfqh Ilislame* (1st edn, Dar Nashr Althuqafh 1967) 650; F. Abdulrahman, *Alta'min Fe Ilislam* (Dar Almtboa'at Aljamaia 2006) 78; M. Almutiei, *Ahkam Alskoratah* (Nile Press 1906) 12; A.Taj 'Shrakit Altamin Mn Wjht Nathar Alsharia'a' (The Seventh Conference for Islamic Researches, Cairo, September, 1972) ; M. Abuzahrah 'Altaleeg Ala Mothoa Agd Altamin' (Islamic Jurists Week, Damascus, April, 1961); M. Abuzaharah, 'Ugod Altamin' (1961) 5 Majlt Hathart Alislam 10, 22 ; International Islamic Fiqh Academy , decision No 9 (2/9) , Jeddah , 22-28 Dec 1985 , published in 2 (2) Majalt Almajma'a, 545 ; *Haiat Kibar Alulma* in Saudi Arabia , decision No 55, 10th session, 25/3/1977; Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978.

¹³¹ Ibid.

¹³² Ibid.

insurance sum, which he paid the premium against, or not. The reason is that it depends on a potential incident which may or may not happen.¹³³

Thirdly, insurance contains *gharar* in amount. The assured insuring against damages is ignorant at the time of the contract of the amount of indemnity he will obtain, since this kind of insurance considers the damages caused by the insured risk, not the amount agreed on in the insurance policy.¹³⁴

Fourthly, insurance contains *gharar* in time. The assured does not know at the time of the contract when he will obtain the indemnity, as it depends again on the occurrence of the insured risk, which is an uncertain event. Islamic Jurists have agreed that ignorance of time in consideration contracts renders the transaction void.¹³⁵

In addition, it was also argued that *gharar* in insurance contracts leads to disputes, e.g. fraud by the insured by creating deliberate accidents to obtain the indemnity.¹³⁶ Moreover, it leads to easy gain without any equivalent consideration of work or goods.¹³⁷ Also, it was claimed that *gharar* in insurance is not forgivable, as the forgivable *gharar* in consideration contracts must be ancillary to the contract (not in the core considerations) and when a necessity occurs.¹³⁸ However, the insurance contract is not an admissible contract, and so the necessity

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfah Islame* (1st edn, Dar Nashr Althufah 1967) 650-670.

¹³⁷ Ibid.

¹³⁸ F. Abdulrahman, *Alta'min Fe Ilislam* (Dar Almtboa'at Aljamaia 2006) 78-81.

doctrine does not apply; nor is it the only way to conclude insurance, as there is an admissible alternative, i.e. cooperative insurance.¹³⁹

After viewing the main claims of the proponents of prohibiting insurance based on *gharar*, the author will now consider the claims of their opponents to arrive at a fair evaluation of the subject.¹⁴⁰

1. According to the *Hanafi* school of law, lack of knowledge by parties, '*jahl*', is not always a barrier to the admissibility of the contract.¹⁴¹ *Jahl* must lead to a dispute preventing the execution of the contract to produce this effect.¹⁴² For example, if a person sold an unspecified ewe from a fold for a specified price, '*jahl*' here is an equal claim between the parties, as the seller will allege to have the right of handing over the lesser quality ewe, and the buyer will allege to have the right to get the higher quality ewe. Therefore, the judge will find difficulty in organising the execution of the contract as *jahl* here is preventing the execution of the contract.¹⁴³ On the other hand, if *jahl* does not lead to such a result, the contract will be admissible, even if the amount of *jahl* is large.¹⁴⁴ For example, if someone has settled with the other party over all his rights for a specified consideration, then the settlement is admissible, as

¹³⁹ Ibid.

¹⁴⁰ For example, M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 52; A. Alkafif, 'Altamin' (1996) 37 (1) Majlat Alazhar 40, 48.

¹⁴¹ M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 52–53.

¹⁴² Ibid,

¹⁴³ Ibid.

¹⁴⁴ Ibid.

the dropping of rights need not be executed.¹⁴⁵ Nonetheless, consideration consists of execution, so it must be known.¹⁴⁶ On that basis, *Hanafis* argued that in an insurance contract, *jahl* is not preventing the execution of the contract, and therefore must be admissible.¹⁴⁷ Each premium has a specified price, and *jahl* in the number of premiums does not prevent executing the contract, as long as the insurer has undertaken that he will indemnify the assured during the contract period if the insured risk occurs.¹⁴⁸

2. The insurance contract is the way to remove *gharar* from the economic situation of people.¹⁴⁹ When a trader, for instance, insures his goods in the sea, his fortune will be known and does not fluctuate.¹⁵⁰ In fact, *gharar* is in not insuring, rather than insuring, when considering the financial situation of a person. However, assuming that the method used for that end, i.e. the insurance contract consists of *gharar*, it will be a minor *gharar* to remove this major *gharar*.¹⁵¹

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid 164.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

3. The argument that insurance contracts lead to disputes because of fraud by the assured is misleading.¹⁵² In this author's opinion, in the example given to support the argument, the main reason behind the dispute was fraud by the insured and not *gharar*. This reason can be noticed in insurance contracts just as in any other contract. In practice, any contract can lead to disputes between parties. There is no guarantee that a contract will be dispute free. *Sharia'a* law has attempted to eliminate disputes by avoiding their roots, and one of them is to avert *gharar* to ensure transparency in the contract and to avoid misconceptions about the subject matter or the other conditions which can lead to disputes. Nonetheless, in insurance contracts uncertainty has been reduced to the minimum by providing a full description of the insured risk, subject matter, conditions which must be complied with in order to obtain indemnity, situations which can render the policy invalid, maximum amount of indemnity, and price of the premium paid. Therefore parties will be fully aware of the limits of liability and description of the insured risk at the time of contracting which reduces the chances of disputes that can be caused by *gharar* or uncertainty. Disputes can arise, for instance, on proving that the risk was an insured peril, which is a matter of fact and material investigation and does not relate to *gharar*. In fact, this thorough information of the species of the insurance contract softens the harsh effects of *gharar* of all kinds and provides a justification for its tolerance.¹⁵³
4. When viewing insurance as a system and not as an individual contract, it was observed that *gharar* is light and not excessive.¹⁵⁴ Regarding the insurer, he can arrive

¹⁵² A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfqh Ilislame* (1st edn, Dar Nashr Althuqafh 1967) 650-670; See above.

¹⁵³ See also A. Alkafif, 'Alta'min (1996) 37(1) Majalt Alazhar 40, 51.

¹⁵⁴ M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 54.

at nearly precise possibilities for the occurrence of the insured risk depending on the law of large numbers and statistical data. This information allows him to calculate each premium correctly and to be more certain of his yearly revenues and financial statements.¹⁵⁵ Regarding the insured, he has no *gharar*, or possibility of it, at all in the insurance contract when considering the main object of insurance, which is security. Security is fulfilled after concluding the insurance contract immediately, without depending on the occurrence of the risk.¹⁵⁶ After insurance, there will be no difference to the insured between the occurrence and non-occurrence of the risk. If the risk does not occur, his rights will still be in place gaining peace of mind; however, if the risk does occur, he will be indemnified.¹⁵⁷ In other words, the insured will obtain security either way, by concluding an insurance contract, removing any kind of *gharar* regarding the main goal of the contract. The contract of guardianship, as a classic contract in the Islamic jurisprudence, is a clear example which indicates that security can be an object of a contract.¹⁵⁸

The opponents of this view based their arguments on the premise that ‘security’ is not suitable to be a ‘consideration’ or an object of the contract, and it is only a goal or a reason for the contract¹⁵⁹ They claimed that the contract of guardianship, unlike insurance, consists of a

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ M. Abuzahrah ‘Altaleeg Ala Mothoa Agd Altamin’ (Islamic Jurists Week, Damascus, April, 1961) ; International Islamic Fiqh Academy , decision No 9 (2/9) , Jeddah , 22-28 Dec 1985 , published in 2 (2) Majalt

work from the guard which led to security, and it discharges the guard from responsibility for what cannot be prevented.¹⁶⁰ The considerations in the guardianship contract are the work of the guard and the payments for the work, while in insurance, the considerations are the premiums and the indemnity.¹⁶¹ Hence, the analogy¹⁶² between the guardianship contract and the insurance contract is an analogy with a difference which makes it null.¹⁶³

Yet, to gain the feeling of security, a person is often prepared to offer the highest of prices. Also, there is no legal proof in *Sharia'a* law which indicates that security cannot be an object of a contract.¹⁶⁴ In fact, when looking at the '*Themmah*' contract, where ancient Islamic territories contracted with their Christian and Jewish residents to pay a sum of money, '*Jezyah*', for their security as residents, we will see that the notion of dealing with intangibles

Almajma'a 545 ; *Haiat Kibar Alulma* in Saudi Arabia , decision No 55, 10th session, 25/3/1977, Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Analogy or *qiyas* is the fourth source of *Sharia'a* law after the *Quran*, *Sunnah* and the consensus of jurists. It is a method to extract a legal rule on a certain matter which has no direct proof from the *Quran* or *Sunnah* by linking it with a matter which has such proof because of a unified reason (*illa*) on both matters. Analogy has certain conditions for it to be correct; for more, see W. Alzuahili, *Alwajeez fe Asool Alfiah* (Dar Alfikr Almo'aser 1994) 56.

¹⁶³ M. Abuzahrah 'Altaleeg Ala Mothoa Agd Altamin' (Islamic Jurists Week, Damascus, April, 1961) ; International Islamic Fiqh Academy , decision No 9 (2/9) , Jeddah , 22-28 Dec 1985 , published in 2 (2) Majalt Almajma'a 545 ; *Haiat Kibar Alulma* in Saudi Arabia , decision No 55, 10th session, 25/3/1977; Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978.

¹⁶⁴ M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 50–51.

and security as an object of a contract was not strange at all to *Sharia'a* law.¹⁶⁵ It may be true that willingness to get security for a price can vary between different kinds of people depending on their attitude. Still, the market must not confine itself by fulfilling the needs of some people and ignoring the needs of others, as long as those needs according to *Sharia'a* law are not extravagant and vary between necessities and supplementaries.¹⁶⁶

Moreover, it is believed that this undertaking by the insurer to pay the indemnity when the insured risk occurs has grounds in *Sharia'a* law; for example, in the principle of obligatory promise according to the *Maliki* school of law,¹⁶⁷ and in the principle of obligatory promise if it was suspended by a licit condition according to the *Hanafi* school of law¹⁶⁸ (the condition here is paying the instalments). When the instalments are paid, the promise becomes obligatory and the goal of it, which is security, is achieved immediately.¹⁶⁹ Thus, there will be no *gharar* depending on the Juristic principle: “promises if suspended, will turn to be obligations.” and “promises suspended by a condition will be confirmed, when the condition is confirmed.”¹⁷⁰

The author is of the view that security can be an object of a contract, as even though we assume that it is a new object in Islamic contract law, it is admissible, according to the juristic

¹⁶⁵ M. Alsaleh, *Altamin Baen Alahdr Wa Alibaha* (1st edn, 2004) 115.

¹⁶⁶ R. Almasri, *Alkatar Wa Altam'in : Hal Alta'min Altejari Ja'az Shra'an?* (1st edn, Dar alkalam 2001) 68.

¹⁶⁷ M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 136–137.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

principle that the original state of things is admissibility unless there is evidence to the contrary from the *Quran* or *Sunnah*.¹⁷¹ However, the author is in disagreement with the view that denies any kind of *gharar* on part of the assured, due to the security that he will obtain from concluding an insurance contract, whether or not the risk occurs.¹⁷²

The author believes that claiming that the assured will gain peace of mind, when the insured risk does not occur, is not accurate. If the insured risk does not occur, the situation will merely result in a confirmation to the status quo, and not a real situation of security. This means that technically, the assured will lose his premiums for nothing in return. It must be borne in mind that the assured pays premiums to secure him when anything goes wrong, not if everything goes right. Suppose the assured had known that the insured risk would not happen, he would not have concluded the insurance in the first place. Thus, it can be said that security in an insurance contract is achieved only when the risk does actually occur. Another reason which justifies this result is that the author believes that security which can be the object of the insurance contract has a meaning different from security as a general term. Security that can be an object of an insurance contract, must have a value, or can be valued by a price. However, security in its wider meaning, which includes psychological feelings and peace of mind, is not suitable for valuation, as the matter is really subjective, with no clear standards to apply, even though some of these feelings and peace of mind may be achieved by the payment of an indemnity. For instance, when insuring a house, the contract fulfils its object, i.e. security, only in the form of payment of the indemnity or repairs which the insurer undertakes to pay, within the limits and conditions agreed upon that consider the value of the

¹⁷¹ See Ibn Abidin, *Hashiyat Radd al-Muhtir*, vol 3 (2nd edn, Albabi Alhalbi Press 1966) 105,161, 372; I. Alsherazi, *Altabsirah* (Dar Alfiker 1983) 535 ; For more see A. Althwehai, *Ga'adt An Alalsal Fe Alshia'a Alibaha* (Imam Muhammad Bin Saud University Press 2007) 28.

¹⁷² Which was the view explained earlier by M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 136–137.

house. If the insurer pays the indemnity, his obligation will be fulfilled, even if the assured did not have real feelings of peace of mind.

Based on these arguments, the author believes that *gharar* does exist in the insurance contract, as the payment of the indemnity is uncertain since it depends on uncertain events. Western scholars also admit this aleatory nature of the insurance contract.¹⁷³ However, the author also thinks that this *gharar* must be tolerated because of the public need and necessity,¹⁷⁴ as it is not excessive. There are well known, admissible contracts in *Sharia* 'a law where *gharar* is spotted, such as *juzaf sale* (sale by estimation),¹⁷⁵ *ja'ala contract* (rewarding promise),¹⁷⁶ *salam sale*,¹⁷⁷ and *istisna'a contract* (contract of manufacturing)¹⁷⁸. Many jurists

¹⁷³ For example, see F. Reichert, *Comparative Insurance Contract Law : General Aspects* in H. Heiss & M. Lakhan on behalf of Project Group Restatement of European Insurance Contract Law (eds), *Principles of European Insurance Contract Law: A Model Optional Instrument* (Sellier European Law Publishers 2011) 112; J. Birds, B. Lynch, & S. Milnes, *MacGillivray on Insurance Law: relating to all risks other than marine* (12th edn, Sweet & Maxwell 2012) para 1-012 ; T. Street, *The History and Theory of English Contract Law* (Foundations of Legal Liability Series, Beard Books 1999) 165-166.

¹⁷⁴ For more about toleration for necessity (*tharorah*) and public need, see W. Alzuhili, *Nathreet Altharorh Alsharaiah* (Moa'sast Alrisalh 1985) 264; M. Almurhil, *Alashbah Wa Alnathe'er* (Maktabt Alrushd 1997) 370; A. Alaamdi, *Alehkam Fe Asool Alahkam* (Mohammad Ali Subaih Library and Press 1968) 203 ; A. Saleh, 'Almaslaha Almursalh Wa Tatbegatha Almoa'aserah' (2000) 16 (1) University of Damascus Journal 353, 355; M. Algazali, *Almustasfa Fe Elm Alasool* (Dar Alkutb Alalmia 1983) 129; I. Alshatbi, *Ale'atsaam* (Dar Ibn Affan 1992) 607 and onwards.

¹⁷⁵ M. Alshokani, *Alsaal Aljarar Ala Hada'eg Alazhar* (1st edn, Dar Ibn Hazam 2004) 489 ; M. Albukari, *Sahih Al-Bukhari* (Kitab Albyoa'a, Dar Ibn Katheer 1993) 752, *Hadith* 2030.

¹⁷⁶ *Hanbali*, *Maliki* and *Shafai* scholars permitted *Ja'ala* for the public need, while *Hanafis* did not permit it generally unless the work required is known subject to certain exceptions; M. Alhattab, *Moahib Aljaleel Fe Sharah Moktasar Khalil* (Kitab Alja'ala, 3rd edn, Dar Alfikr 1992) 453; M. Albahoti, *Kashaf Algena'a Fe Matn Aligna'a* (Dar Alfikr 1982) 203; M. Alshurbini, *Mugni Almuhtaj Ila Ma'arft Alfath Almenhaj* (Dar Alkutb

have refused to apply the analogy doctrine ‘*qiyas*’, between these contracts and insurance contract, and entire chapters have been written to refute this analogy.¹⁷⁹ Nonetheless, the author believes that these jurists missed the point that there is actually a *gharar* element in these contracts even though *qiyas* doctrine cannot be fully applied. The author agrees that *qiyas* cannot be applied for a simple reason, as the insurance contract is a new financial transaction, which, although similar to well-known contracts in Islam, nonetheless has substantial differences from them. Regarding the *gharar* element, these contracts contain it on different levels and sometimes at a level higher than the insurance contract itself, which is the main point that must be highlighted. The *Jala’a* contract is a unilateral obligation by a person

Alalmia 1992) 217; Y. Alnawwai, *Rothat Altalbeen Wa Muntga Alyanboa’a Fema Zad An Alraothah Ljlal Aldeen Alsayoti* (Alkutb Alalmia 1992) 335; Ibn Abidin, *Hashiyat Radd al-Muhtir*, vol 3 (2nd edn, Albabi Alhalbi Press 1966) 290.

¹⁷⁷ M. Albukari, *Sahih Al-Bukhari* (Kitab Alsalam, Dar Ibn Katheer 1993) 781, *Hadith* 2124; M. Alhattab, *Moahib Aljaleel Fe Sharah Moktasar Khalil* (Kitab Alsalam, 3rd edn, Dar Alfikr 1992) 515.

¹⁷⁸ In the *istisna’a* contract, the payment and delivery are on a later date, the price and description must be agreed on in advance, and if the goods are made, the buyer will still have the right of inspection; *Shafai*, *Hanbali*, and *Maliki* schools classified it as kind of *salam* sale and required *salam* conditions for it to be admissible. However the *Hanafi* school admitted it as a separate contract; See International Islamic Fiqh Academy, decision No 65 (7/3), Jeddah, 9 – 14 May 1992, published in 7 (2) *Majalt Almajma’a* 223; W. Alzhuaili, *Alfiqh Alislamee Wa Adltah* (Dar Alfikr 1991) 632; M. Alzarga, *Agd Alistisna’a Wa Mda Ahmeth Fe Alistithmarat Alislameah Almo’asirah* (AlMah’ad Alislamee Llbuhooth Wa Altadreeb 1995) 18-19.

¹⁷⁹ For example, A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfah Islame* (1st edn, Dar Nashr Althufah 1967) 650-670; M. Abuzaharah, ‘Ugod Altamin’ (1961) 5 *Majlt Hathart Alislam* 10,16; E. Esaoi, ‘Altamin Fe Alshria’a wa Alganon’ 4 (1) (1962) *Majalt Aloloom Alqanonyah Wa Aaleqtisadyiah* 197,203; International Islamic Fiqh Academy, decision No 9 (2/9), Jeddah, 22-28 Dec 1985, published in 2 (2) *Majalt Almajma’a* 545; *Hiat Kibar Alulma* in Saudi Arabia, decision No 55, 10th session, 25/3/1977; Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978.

to offer a known reward, '*ja'al*', for completing a certain task,¹⁸⁰ for instance, if someone says, "*If somebody returns my lost camel, I will pay him 100 pounds*". If the camel is found, he will be obliged to give 100 pounds to whoever found it; however, if nobody finds the camel, he will not be obliged to give a reward to anybody for their time and effort.¹⁸¹ *Gharar* here can be noticed in time, as there is no specific time where the worker deserves the reward, since it depends on an uncertain event, i.e. finding the camel, which may or may not occur.¹⁸² Additionally, it is noticed in the other party of the contract, as the person who seeks the reward and tries to find the camel, is not specified.¹⁸³ Also, in the work done by the worker as it does not need to be specified.¹⁸⁴ In a *Juzaf* sale, *gharar* in the subject matter is observed, since the subject matter is determined by mere viewing and not by weight, measure, or number.¹⁸⁵ In a *salam* sale and *istisna'a* contract, where *gharar* in the subject matter is derived from its non-existence at the time of the contract, *gharar* is eliminated by providing a description of the subject matter in both contracts, time of future delivery in *salam*, and the right of inspection in *istisna'a*.¹⁸⁶

¹⁸⁰ A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfah Islame* (1st edn, Dar Nashr Althuqafh 1967) 601.

¹⁸¹ Y. Alnawwai, *Rothat Altalbeen Wa Muntga Alyanboa'a fema Zad An Alraothah Ljla Aldeen Alsayoti* (Alkutb Alalmia 1992) 335.

¹⁸² I. Alsherazi, *Almohathab Fe Fiqh Alimam Alshafa'i* (1st edn, Eisa Albabi Alhalbi Press 1915) 411.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ M. Alshokani, *Alsaal Aljarar Ala Hada'eg Alazhar* (1st edn, Dar Ibn Hazam 2004) 489 ; M. Albukari, *Sahih Al-Bukhari* (Kitab Albyoa'a , Dar Ibn Kather 1993) 752, *Hadith* 2030

¹⁸⁶ M. Albukari, *Sahih Al-Bukhari* (Kitab Alsalam, Dar Ibn Katheer 1993) 781, *Hadith* 2124; M. Alhattab, *Moahib Aljaleel Fe Sharah Moktasar Khalil* (Kitab Alsalam, 3rd edn, Dar Alfikr 1992) 515; International Islamic Fiqh Academy , decision No 65 (7/3), Jeddah, 9 – 14 May 1992 , published in 7 (2) *Majalt Almajma'a* 223; W.

In all of these contracts, *gharar* was observed, but it was forgivable as an exception to the general rule, for the public need and to remove difficulty among people.¹⁸⁷ In some of these contracts, *gharar* was reduced to the minimum, e.g. in *salam*, while in others, *gharar* was excessive, e.g. in *ja'ala*.¹⁸⁸ In contrast, *gharar* in insurance contracts is reduced to the minimum, as the premium, the subject matter, the conditions, the risk insured, the limits of liability and the parties of the contract are specified adequately. Hence, we can say that *gharar* is not excessive as both sides of the contract are fully aware of the species of the contract which eliminates disputes as the essence of prohibition and provides transparency. Additionally, forgiving *gharar* in insurance contracts responds to public need and necessity,¹⁸⁹ as most people need insurance today as a security from unexpected incidents in their lives, and to relieve them from the financial burden that they will bear which can jeopardise their whole financial situation.

Alzhuaili, *Alfiqh Alislamee Wa Adltah* (Dar Alfikr 1991) 632 ; M. Alzarga, *Agd Alistisna'a Wa Mda Ahmeth Fe Alistithmarat Alislameah Almo'asirah* (AlMah'ad Alislamee Llbuhooth Wa Altadreeb 1995) 18-19.

¹⁸⁷ See above.

¹⁸⁸ Ibid.

¹⁸⁹ For more about toleration for necessity (*tharorah*) and public need, see W. Alzuhili, *Nathreet Altharorh Alsharaiah* (Moa'sast Alrisalh 1985) 246 ; M. Almurhil, *Alashbah Wa Alnathe'er* (Maktabt Alrushd 1997) 370; A. Alaamdi, *Alehkam Fe Asool Alahkam* (Mohammad Ali Subaih Library and Press 1968) 203 ; A. Saleh, 'Almaslaha Almursalh Wa Tatbegatha Almoa'aserah' (2000) 16 (1) University of Damascus Journal 353,355 ; M. Algazali, *Almustasfa Fe Elm Alasool* (Dar Alkutb Alalmia 1983) 129 ; I. Alshatbi, *Ale'atsaam* (Dar Ibn Affan 1992) 607 and onwards.

2.2.2 Riba

I Definition

The Arabic term *riba* is referred to as interest or usury. However, it is a border concept under *Sharia'a* law. *Riba* as generally agreed, can be defined as:

*“Unlawful gain derived from the quantitative inequality of counter values in any transaction purporting to affect the exchange of two or more species (anwa'a sing. nwa'), which belong to the same genus (jins) and are governed by the same efficient cause (illa pl.ilal). Deferred completion of the exchange of such species, or even of species which belong to different genera but are governed by the same illa are also riba, whether or not the deferment is accompanied by an increase in any one of the exchange counter values.”*¹⁹⁰

Riba can be classified into three categories:

- a. *Riba alfadad*, which is the unlawful gain from the exchange of the counter-values, as above.¹⁹¹
- b. *Riba alnaisaa*, which is examined when the exchange of the counter-values is deferred, as above.¹⁹²
- c. *Riba aljahliyah* (pre Islamic *riba*), examined when the lender asks the borrower at maturity date either to settle the debt, or increase it by charging interest.¹⁹³

¹⁹⁰ N. Saleh, *Unlawful Gain and Legitimate profit in Islamic Law* (Arabic and Islamic Law Series, 2nd edn, Graham and Tortman 1992) 16.

¹⁹¹ Ibid.

¹⁹² Ibid; See also M. Albukari, *Sahih Al-Bukhari* (Kitab Albyoa'a, Dar Ibn Katheer 1993) 761, *Hadith* 2069, 2070, 2071, 2070.

Prohibition of *riba* was subject to the scrutiny of many authors.¹⁹⁴ It was observed that some prohibition justifications are derived from the unequal exchange of benefits between the lender and the borrower in the transaction tainted by *riba*, as where the lender gets an amount of money (interest), the borrower gets only a delay in time, which may or may not be beneficial to him.¹⁹⁵ Moreover, *riba* transactions are considered an easy gain, as the creditor will be the major sharer in the profit with a person, just by lending him money and without consuming any of his time or effort. Therefore, his partnership will be in profit only and not in loss, which is unfair.¹⁹⁶ Also, it contains exploitation of the weak and needy position of the poorer party i.e. the debtor.¹⁹⁷

¹⁹³ Ibid.

¹⁹⁴ For example, S. Sultan, *Alriba: illatah wa thoabtoh Wa Bai'a Aldaen* (Dar Asda'a Almujtma'a 2000); A. AlMaudoodi, *Alriba* (Dar Alfikr Alislame Alhadith 2001); S. Qutub, *Tafseer Ayat Alriba* (Dar Alshroog 1978); H. Alajlan, *Alriba Wa Aliqtsad Wa Altmoeel Alislamee: Roa'eah Muktalifah* (Markz Dirasat Alwihdah Alarabiah 2010); S. Dunya, *Alshubhat Almo'asirh Libaht Alriba: Arth Wa Tafneed* (Maktbt Wahbh 1994); O. Almutrik, *Alriba Wa Almo'amlat Almasrfiah Fe Alsharia'h Alislamyah* (Dar Alasimah Llnasher wa Altwaze'a 1998); N. Saleh, *Unlawful Gain and Legitimate profit in Islamic Law* (Arabic and Islamic Law Series, 2nd edn, Graham and Tortman 1992) ; N. Obeid, *The Law of Business contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996).

¹⁹⁵ S. Olyan, *Alt'amin fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996) 155–165.

¹⁹⁶ Ibid.

¹⁹⁷ N. Obeid, *The Law of Business contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 48.

II Islamic Legal Source

The main *Quranic* base for prohibiting *riba* can be examined in this verse, “*But God hath permitted sale and forbidden usury*”¹⁹⁸. Nonetheless, it is believed that pre Islamic *riba* is the one directly linked to the *Quran*, while the other types, i.e. *riba alfadal* and *alnasia’a*, refer to *Sunnah*.¹⁹⁹ In *Sunnah*, the principle articles which may result in these two types of *riba* are clearly defined. Obadh Bin Alsamet heard the prophet say:

“*Gold for gold, silver for silver, wheat for wheat, barley for barley, date for date, salt for salt, of the same quantity and quality, from hand to hand. If there is a surplus, this is usury. If the articles [exchanged] are of a different nature, sell as you please, but from hand to hand.*”²⁰⁰

Prohibition can extend by analogy doctrine ‘*qiyas*’ to all species which are governed by the same efficient cause, which belong to the same genera of the six articles above.²⁰¹ There is a consensus between jurists on the prohibition of the pre Islamic *riba* and *riba alfadal* and

¹⁹⁸ The Holy *Quran*, *Surat Albagrah*, verse 275.

¹⁹⁹ A. Alsunhori, *Masadir Alhaqq*, vol 3 (Ma’ahd Alderasat Alarbiah Alaliah 1967)18-217; M. Albukari, *Sahih Al-Bukhari* (Kitab Albyoa’a, Dar Ibn Katheer 1993), 736, *Hadith* 1980.

²⁰⁰ There is a consensus between jurists on the prohibition of *riba alfadal* and *alnasia’a* in these six articles; Y. Alnawwai, *Sahih Muslim With Alnawwi Explanation* (Kitab Albyoa’a, Dar Alsalaam 1996) 9; See also, M. Albukari, *Sahih Al-Bukhari* (Kitab Albyoa’a, Dar Ibn Katheer 1993) 761, *Hadith* 2066, 2062, 2065, 2067 ; N. Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law* (Arabic and Islamic Law Series, 2nd edn, Graham and Tortman 1992) 17.

²⁰¹ Discrepancies can be spotted between Jurists regarding the extent of analogy and what species will have the same rule of the six articles in the *Hadith*; Y. Alnawwai, *Sahih Muslim With Alnawwi Explanation* (Kitab Albyoa’a, Dar Alsalaam 1996) 9 ; A. Ibn Gudamh, *Almugni* (Dar Alfikr 1985) 26.

alnasia'a in the six articles as in the *Hadith* in all schools of Islamic law²⁰² However, there are discrepancies spotted in some specifications regarding *riba alfadal* and *alnasia'a*.²⁰³

III **Riba And Insurance**

The traditional view among jurists about insurance is that it is a contractual system which comprises all kinds of *riba*, and the transaction cannot be imagined without it,²⁰⁴ as follows:

1. In the insurance contract, if the insured risk occurs, the indemnity that the company pays to the assured is either less than, more than, or equal to the premiums he paid. If the indemnity is less or more than what he paid, then we are facing *riba alfadal* and *alnasia'a* together.²⁰⁵ As for *riba alfadal*, it can be examined due to the inequality between the sums exchanged, even if they are from

²⁰² Y. Alnawwai, *Sahih Muslim With Alnawwi Explanation* (Kitab Albyoa'a, Dar Alsalaam 1996) 9 ; A. Ibn Gudamh, *Almugni* (Dar Alfikr 1985) 26; M. Alsaleh, *Altamin Baen Aahdr Wa Alibaha* (1st edn, 2004) 121.

²⁰³ Ibid; for example on the species which will have the same rule of the six articles where *riba alfadal* and *alnasia'a* can be observed, and the extent of the application of the analogy doctrine on them; Y. Alnawwai, *Sahih Muslim With Alnawwi Explanation* (Kitab Albyoa'a, Dar Alsalaam 1996) 9; A. Ibn Gudamh, *Almugni* (Dar Alfikr 1985) 26.

²⁰⁴ See M. Alsaleh, *Altamin Baen Aahdr Wa Alibaha* (1st edn, 2004) 116-126, 246; S. Olyan, *Alt'amin Fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996) 158 ; M. Almutiei, *Ahkam Alskoratah* (Nile Press 1906) 38; A.Taj 'Shrakit Altamin Mn Wjht Nathar Alsharia'a' (The Seventh Conference for Islamic researches, Cairo, September, 1972) ; M. Abuzahrah 'Altaleeg Ala Mothoa Agd Altamin' (Islamic Jurists Week, Damascus, April, 1961); M. Abuzaharah, 'Ugod Altamin' (1961) 5 Majlt Hathart Alislam 10,16; International Islamic Fiqh Academy , decision No 9 (2/9) , Jeddah , 22-28 Dec 1985 , published in 2 (2) Majalt Almajma'a 545; This was also the view of *Haiat Kibar Alulma* in Saudi Arabia , decision No 55, 10th session, 25/3/1977; Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978.

²⁰⁵ M. Alsaleh, *Altamin Baen Aahdr Wa Alibaha* (1st edn, 2004) 121.

the same genera (premiums and indemnity), while *riba alnasia'a* is found due to the deferment in this exchange.²⁰⁶ Moreover, even if the premiums paid are exactly equal to the indemnity sum, which is rare, *riba'a alnasia'a* is spotted, due to the deferment in the transaction.²⁰⁷ Thus, it is obvious that insurance must consist of *riba*, as it cannot be performed without it.²⁰⁸ Additionally, insurance is a void form of money exchange contract, as it is exchanging money for money, where money from one of the parties is not collected at the same time as the contract. The correct form of money exchange contract must be of the same amount, and hand by hand according to *Sharia'a* law.²⁰⁹

2. In life insurance, after the insurance contract comes to an end, the assured will be given the amount contracted upon, which he paid in instalments, plus an extra amount, which is considered *riba*, since it is given without something in return but with a delay in time.²¹⁰ If the assured paid one premium and the insured risk occurred, his heirs will be given the insurance amount agreed upon in the contract whatever its amount is, and that is *riba* as well.²¹¹

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ S. Olyan, *Alt'amin Fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996) 158–159.

²¹¹ Ibid.

3. Insurance companies invest their money from premiums paid by the assureds in transactions tainted by *riba*, such as lending, or buying stocks and securities with interest.²¹²
4. If the assured delays paying one of his premiums, he will be obliged to pay interest for this delay, which is a condition joint to insurance and that is *riba alnasia'a*.²¹³
5. Most of the insurance profits derive from the difference between the indemnities paid by the company and the investments of the premiums, which all are tainted by *riba*.²¹⁴

These allegations which taint insurance contracts with *riba* were countered as follows:

1. The insurance contract does not contain *riba*. The exchange in consideration here is between money (premiums) and a benefit (bearing the consequences of the insured risk). The benefit is not from the six articles mentioned in the *Hadith*, and the considerations are not from the same genera. Therefore, *riba alfadl*, which requires that the exchange must be between species from the same genera, and *riba alnasia'a*, cannot be imagined.²¹⁵ Also, the definition of the money exchange contract cannot be applied, as the considerations must all be in the form of money, which is not in the insurance contract as explained.²¹⁶ It must be borne in mind

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ A. Alkafif, 'Alta'min' (1966) 37(1) Majalt Alazahr 40, 60, 61.

²¹⁶ Ibid.

that the indemnity is not in exchange for the premiums, and the proof is that it is not paid in most insurance cases, since it depends on the occurrence of the insured risk. If the indemnity is actually in exchange for premiums, it must be always paid.²¹⁷ Additionally, indemnity is limited to the amount of damages, as the goal of insurance is not profit for the assureds, but the security of their money.²¹⁸

2. Alleging that insurance companies' investments are all tainted by *riba* is not conclusively true.²¹⁹ Many insurance companies invest their money in licit commercial and industrial investments.²²⁰ To ensure peace of mind, the insured can place a condition on the insurer that he does not invest what he takes in *riba* transactions, but if he does then the sin will be on the insurer, not on the assured.²²¹
3. One must distinguish between insurance as a legal system on one hand, and conditions and contracts that are not a requirement of it, on the other hand. Judging the insurance system based on these contracts and conditions is not right, as they are not a necessary element of insurance contracts.²²² Hence, the contracts that insurance companies conclude as a kind of investment cannot be used to judge

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid.

²²² M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 55, 139.

the insurance system as whole.²²³ Moreover, in life insurance, taking interest on top of the premiums paid is not a requirement of the insurance system, but is a condition in the contract, which can be judged on its own merits, instead of judging the whole insurance contract.²²⁴ *Riba* cannot be imagined in the temporary life insurance to death, as it is an agreement to help the assureds' family when the assured die.²²⁵ However, it can be imagined in saving insurance and in that case the contract can be amended to make the insurance company invest the premiums in an admissible way, such as *mudarabh*.²²⁶ In the *mudarabh* contract, the insurance company acts as an agent to the assured in investing the premiums paid, and at the end of the contract, the capital, and a share of the profit, if any, is returned to the assured.²²⁷

4. Prohibiting the insurance contract based on *riba* by alleging that in insurance the assured pays a little sum and may get larger or lesser sums in return suggests the prohibition of mutual insurance along with the pension and social security systems, which the majority of jurists consider licit with no doubt.²²⁸ These systems also depend on the assured paying a small sum of money (the premium)

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

after which they may get a larger or lesser sum (indemnity or the pension allowance).²²⁹

In this author's opinion, the main reason for the *riba* claims stems from a misunderstanding of the concept of insurance and considerations in the insurance contract, with rising claims which are not connected directly to the insurance contract per se. It is obvious that the proponents of the prohibition due to the *riba* argument view the insurance contract as a bilateral contract, where parties exchange 'promises' which result in duties and rights on both sides; in other words, make each party a creditor and a debtor at the same time for the promises exchanged. They see that the promise of the insurer to pay the indemnity obverses the promise of the assured to pay the premiums. On that basis, they claim that *riba* is noticed since the amounts paid by the insurer may be less than, more than, or equal to with deferment, the amount paid by the assured. Nonetheless, the fact is that insurance is a unilateral contract.²³⁰ In a unilateral contract the promise of one party (offeror) is exchanged with a certain act from the other party (offeree). Once this act is performed, the promise becomes enforceable on the offeror, without any obligations or promises from the offeree.²³¹ In the same manner, the insurer (who is the only one who makes enforceable promises in the insurance contract) promises to pay the indemnity in the contract if the assured pays the premiums and complies with certain provisions in the policy. If the assured pays the premiums, the promise of the insurer to pay the indemnity becomes enforceable without any other promise returned from the assured, as nothing will be required from his side. On that

²²⁹ Ibid.

²³⁰ For more see J. Perillo, *Contracts* (7th edn, West 2014) 56 ; M. Dorfman & D. Cather, *Introduction To Risk Management And Insurance* (10th edn, Pearson Prentice Hall 2012) 151; G. Rejda, *Principles Of Risk Management And Insurance* (12th edn, Pearson Education 2013) 99.

²³¹ See J. Chitty, *Chitty on Contracts: General Principles*, vol 1 (31st edn, Sweet and Maxwell 2012) para 1-098.

basis, *riba* cannot be imagined, as the payment of the indemnity by the insurer is not in return for the assured's payment of premiums and therefore, these amounts must not be compared. Also, it is clear that the idea of the insurance system is still not understandable by the prohibitors, especially when they claim *riba* by saying that the assured pays a small sum and may get a sum larger than the premiums paid.²³² The idea of insurance stems from removing the financial burden from the members of the society by gathering similar risks together. The amounts paid by the assureds are their share as members in the system and are used to remove the financial burden from the members by indemnifying them if the insured risk occurs. Even though the assured may get a larger sum when the risk occurs, the rise is a result of pooling the premiums together to face the insured risk, and it is not because of a delay in time nor is it because of exchange of debts which each party owe to the other. Thus, the *riba* argument is not possible.

The author agrees that there might be *riba* in the insurance companies' investments.²³³ However, this argument can apply to any company and not only to insurance companies. In other words, it is not purely connected to the insurance contract per se. Yet, the author does not think that the solution is for the assured to put a condition on the insurer²³⁴, as the assured is the weak party in the contract, keeping in mind that insurance can be classified as a contract of adhesion.²³⁵ The best way is to put this condition in the memorandum of

²³² See M. Alsaleh, *Altamin Baen Aahdr Wa Alibaha* (1st edn, 2004) 121.

²³³ See S. Olyan, *Alt'amin Fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996) 158–159.

²³⁴ That was suggested by A. Alkafif, 'Alta'min' (1996) 37(1) 40, 69-70.

²³⁵ See F. Kessler, 'Contracts of Adhesion--Some Thoughts about Freedom of Contract' (1943) 43 Colum L Rev 629, 631; A. Ehrenzweig, 'Adhesion Contracts in the Conflict of Laws' (1953) 53 Colum L Rev 1072, 1076; T. Rakkof, 'Contracts of Adhesion: An Essays in Reconstruction' (1983) 96 Harv L Rev 1173, 1148; R. Merkin & J. Steele, *Insurance and the Law of Obligations* (OUP 2013) 46-49.

association of the company, which makes the company comply with Islamic law in its transactions.

On the other hand, the author does not believe that the goal of insurance argument, which claims that insurance is not a way for seeking profit but a way to maintain the person's fortune, is suitable to defend it against *riba*.²³⁶ Regarding the assured, he may want to conclude insurance to maintain his fortune. However, when using insurance as a saving method, the assured's intention for profit is recognisable. Additionally, the goal of insurance argument does not apply to the insurance company as an insurer as its main goal is to seek profit from concluding insurance contracts.

²³⁶ That was the view of A. Alkafif, 'Alta'min' (1996) 37(1) Majalt Alazahar 40, 61.

2.2.3 Gambling And Betting

I Definition

Early Islamic jurists had several definitions of gambling: Ibn Qudama defined it as where every party must either win or lose;²³⁷ Ibn Qyam Aljawzyiah defined it as where every gambler is circulating between winning or losing;²³⁸ Ibn Taymiyah defined it as when the person's money is taken on risk, the person does not know if he will be going to get it back or not.²³⁹ Most definitions of gambling are similar as there is a risk element, where one of the parties becomes a winner and the other party a loser.²⁴⁰ Modern law scholars have defined the gambling contract as a contract where each party promises the other to pay a certain amount of money or anything agreed upon if he loses the gamble to the party who wins.²⁴¹ On the other hand, the betting contract can be defined as a contract where each party promises the other to pay, if he was not correct in an uncertain event, a sum of money or anything agreed upon.²⁴² Thus, one can see that gambling and betting are similar in that the parties' rights depend on uncertain events. Nonetheless, in gambling, unlike betting, the gambler performs a positive role in trying to make this event happen.²⁴³ Such contracts are voided by the civil

²³⁷ M. Almaqdasi, *Almugni* (Dar Alaam Alkutb 1996) 413.

²³⁸ S. Aljawzyiah, *Alforsiyah* (3rd edn, Dar Alndlus 2003) 223.

²³⁹ A. Ibn Taymiyah, *Majmoa'a Fatoa Shik Alislam Ibn Taymiyah* (Mojama'a Almalik Fahad 1995) 238.

²⁴⁰ See also E. Altabri, *Ahkam Alqura'an* (1st edn, Dar Alkutb Alamiah 1983) 368; A. Almaordi, *Alhaoi Fe Fiqh Mathab Alimam Alshafa'ai* (1st edn, Dar Alkutb Alamia 1999) 645.

²⁴¹ A. Alsunhori, *Alwaseet Fe Sharh Alqanon Almadni*, vol 7 (Manshorat Alhalbi Alhogogiah 1998) 1257–1258.

²⁴² Ibid.

codes of many countries, which regulate the consequences of that avoidance in their laws.²⁴⁴ These laws do not force the loser to pay what is agreed in the contract and courts do not accept such cases.²⁴⁵

II Islamic Legal Source

Gambling and betting are prohibited by the *Quran*²⁴⁶, *Sunnah*²⁴⁷ and the consensus of the jurists²⁴⁸. The *Quran* addresses this prohibition in the following verse: “*O ye who believe! Intoxicants and gambling, Sacrificing to stones, And divination by arrows, Are abomination, Of Satan’s handiwork: Eschew such (abomination), That ye may prosper*”²⁴⁹

It is believed that the justification of prohibition is that gambling creates hatred between people and keeps them away from praising god, and prayers.²⁵⁰ However, *Sunnah* has

²⁴³ Ibid; This distinction, however, is not of importance practically as gambling and betting mostly have the same rule in law since they are all aleatory contracts.

²⁴⁴ See French Civil Code, Art 1965, Egyptian Civil Code, Art 739; see also MIA1906, s 4 ; A. Alsunhori, *Alwaseet Fe Sharh Alqanon Almadni*, vol 7 (Manshorat Alhalbi Alhogoghiah 1998) 1257–1258.

²⁴⁵ Ibid.

²⁴⁶ *Surat Albagrah*, verse 219; *Surat Alma’aida*, verse 90-91.

²⁴⁷ M. Alshokani, *Nael Alaotar* (Dar Alhadith 1993) 107-108 , *Hadith* 3553-3557.

²⁴⁸ M. Alandlusi, *Tafseer Albahr Almuhit* (1st edn, Dar Ihya’a Altrath Alarabi 2002) 250.

²⁴⁹ The Holy Quran, *Surat Alma’aida*, verse 90.

²⁵⁰ The Holy Quran, *Surat Almaa’ida*, verse 91.

permitted betting on horse and camel competitions and in javelin throwing with conditions, to encourage horse riding and strength preparation.²⁵¹

III Gambling And Insurance

The insurance contract was viewed by some scholars as a form of gambling or betting, and therefore must be prohibited.²⁵² They numerated different arguments to support their view as follows:

1. Insurance is like gambling in that the assured gets the indemnity depending on an event that is beyond his control, and uncertain in its occurrence, neither of the parties know when it will occur, and it is only by god's will. This is exactly like gambling, which depends solely on luck, and does not happen unless by god's will, and neither of the parties have any role in it.²⁵³
2. No insurance can be imagined without the risk and possibility elements. Risk is a primary requirement for insurance, as there is no insurance without risk. Possibility is what insurance companies rely on to generate their profits and

²⁵¹ J. Alsayoti, *Sharah Alsayoti Lsnn Alnisa'ai* (Dar Albashe'er Alislamiyah 1986) 229, *Hadith* 3585.

²⁵² For example, F. Molowi, *Nizam Alta'min Wa Moqf Alsharia'a Alislamiyah Mnh* (1st edn, Dar Alrushad Alislamiyah 1988) 143; S. Olyan, *Alt'amin fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996) 169-171; A. Alnajjar, *Aqd Alta'min Wa Mashroaith Fe Alafqh Alislami* (1st edn, Dar Alnahda Alarabiah 1994) 211-218; F. Abdulrahman, *Alta'min Fe Ilislam* (Dar Almtboa'at Aljamaia 2006) 81; M. Almutiei, *Ahkam Alskoratah* (Nile Press 1906) 24 ; International Islamic Fiqh Academy , decision No 9 (2/9) , Jeddah , 22-28 Dec 1985 , published in 2 (2) *Majalt Almajma'a* 545 ; *Haiat Kibar Alulma* in Saudi Arabia, decision No 55, 10th session, 25/3/1977; Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978.

²⁵³ F. Molowi, *Nizam Alta'min Wa Moqf Alsharia'a Alislamiyah Mnh* (1st edn, Dar Alrushad Alislamiyah 1988) 143; M. Almutiei, *Ahkam Alskoratah* (Nile Press 1906) 24.

calculate their revenues. These two elements are the most fundamental in all insurance, and all gambling as well. Hence, insurance is gambling and must be prohibited.²⁵⁴

3. Contracts generally are concluded based on the equality in value between considerations that each party gives or takes. However, in gambling the gain in each contract is not suitable compared to the loss. Also, the gain is not certain. In the same manner, in insurance the gain is not suitable compared to the loss, as the assured may pay just a few premiums and get a larger sum if the insured risk occurs, which is not comparable with what he paid. Moreover, the insurer may get all the premiums and not pay anything in return, due to the end of the insurance contract without the occurrence of the risk.²⁵⁵ Adding to that, in life insurance the compensation from the insurer is usually much more than the premiums paid by the assured.²⁵⁶ The gain in insurance is just like gambling, as it is uncertain since it depends on uncertain events that depend on luck and coincidence, and do not depend on the will of the parties.²⁵⁷
4. The insured, when concluding an insurance contract, hopes to offer a small amount of money and obtain a large amount from the insurer, just as in gambling.²⁵⁸ Moreover, it is known that in gambling one of the parties must

²⁵⁴ S. Olyan, *Alt'amin fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996) 170-171.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

lose and the other party must win, and it is impossible that they both win, and these characteristics are evident in insurance. Thus, insurance is similar to gambling in its manner, even if it is not gambling.²⁵⁹

5. Gambling and betting are contracts of consideration as the gambler's or the better's gain is in return of his possibility of losing, and his loss is in return of his possibility of gaining. Similarly, insurance is also a contract of consideration. The insurer gains the premiums in return for the possibility of his losing if the insured risk occurs. Also, his loss when the insured risk occurs is in return for his possibility of gaining the premiums had the risk not occurred.²⁶⁰
6. Gamblers and betters are bound to each other to pay the amount agreed upon when the risk occurs, just like in the insurance contract. In insurance contracts, the insurer promises to pay the indemnity if the insured risk occurs, and when the assured pays the premiums.²⁶¹
7. Gambling, betting, and insurance are all aleatory contracts. Gamblers and betters in the contract do not know at the time of the contract what each of them takes or gives, since that depends on the occurrence of uncertain events. In the same manner, in insurance contracts the insured does not know how many premiums he will pay, and the insurer does not know how many of these

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ A. Alnajjar, *Aqd Alta'min Wa Mashroaith Fe Alafqh Alislami* (1st edn, Dar Alnahda Alarabiah 1994) 211–218.

premiums he can take. Also, neither of them knows whether the indemnity will be paid or not, since that depends on the occurrence of an uncertain risk.²⁶² Additionally, the amount of indemnity that will be paid in almost all kinds of insurance against damages, and insurance against people when the amount is agreed to be paid based on damages, is unknown to the parties.²⁶³

8. Insurance, gambling and betting are all alike in their unknown consequences, as parties do not know whether the risk will occur or not, or when will it occur. The ignorance of consequences is a kind of gambling.²⁶⁴

These arguments were countered by scholars whom viewed insurance and gambling as totally different transactions with different goals and objectives.²⁶⁵ Their views can be summarised in these points:

1. Gambling and insurance have totally different objectives. Gambling is a kind of gaming, which depends on luck for the goal of gaining money and profiting. The *Quran* described it as one of Satan's ways, which brings up hatred between people and keeps them away from praising god, and prayers. That is completely the opposite of the insurance system, which is based on restoring the consequences of the catastrophes which affect the person or his finances, by the way of cooperation

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ F. Abdulrahman, *Alta'min Fe Ilislam* (Dar Almtboa'at Aljamaia 2006) 81.

²⁶⁵ For example, M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 47–48,134.; A. Alkafif, 'Alta'min' (1996) 37 (1) Majalt Alazahar 40, 41; A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfqh Ilislame* (1st edn, Dar Nashr Althuqafh 1967) 648.

and dividing this burden among the others. Moreover, the insurance contract's aim is to indemnify the assured, and not to profit.²⁶⁶

2. Insurance gives the person security from the effects of catastrophes and secures his fortune. On the other hand, gambling is the catastrophe in itself, so the two cannot be compared.²⁶⁷
3. Insurance contracts comprise a useful consideration for both parties. They contain a financial profit for the insurer, and security for the assured before the occurrence of the risk, and compensation after its occurrence. This beneficial consideration is not examined in gambling, as there is no benefit for the loser when the winner wins.²⁶⁸
4. Prohibiting gambling in Islam does not rely on the economic factor alone to justify comparing it with insurance, based solely on the financial consideration and the aleatory nature. The justification is ethical and social in the first place, as indicated by the *Quran*.²⁶⁹ Also, regarding the economic impact, it is obvious that gambling confuses the natural life system that is based on work and reward, and disturbs the fair distribution of fortune. In contrast, insurance removes this confusion, which is created by risks and accidents, from the economic life.²⁷⁰

²⁶⁶ M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 47–48,134.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

5. Saying that the risk and possibility in insurance are the justifications for its prohibition is not true. There are a lot of obligations that can be admissible in Islam even if they were suspended on a condition, which is the risk of occurrence. The effects of the obligations do not take place until the condition is satisfied, but, the transaction is not prohibited.²⁷¹ The justification of prohibition in gambling and betting is that they are a waste of money in the hope of gaining illusory profit; the occurrence is suspended on pure luck and chance.²⁷²
6. Insurance comprises meanings of security, keeping away from risks, and a cautious approach for the future. However, gambling comprises meanings of risk creation, keeping away from security, and getting into future complexities. Hence, the two cannot be comparable.²⁷³
7. The insured has to prove that he suffered a financial loss to get the indemnity, in other words that he has an insurable interest in the insured subject matter, while that is not examined in gambling.²⁷⁴
8. The insurer, after paying the insured, has the rights of subrogation and taking over the client's claim for damages. Thus, the insurer does not always pay the assured and get nothing in return, as in gambling.²⁷⁵

²⁷¹ A. Alkafif, 'Alta'min' (1996) 37 (1) Majalt Alazahr 40, 41.

²⁷² Ibid.

²⁷³ A. Aldrarir, *Algharar Wa Authrh Fe Aluqod Fe Ilfqh Ilislame* (1st edn, Dar Nashr Althuqafh 1967) 648.

²⁷⁴ A. Alghadyain 'Insurance: The Islamic Perspective and its Development in Saudi Arabia' (1999) 14 ALQ 332, 334.

9. Gambling is a method of enrichment as parties seek profit from the transaction. However, insurance generally is not a method of enrichment since the indemnity paid by the insurer is only to compensate the loss suffered by the assured and not to enrich or profit him.²⁷⁶ This is believed to reduce the moral hazard and risk creation incentives. That is why the risk in gambling is ‘speculative’ as it has the possibility of winning or losing, while the risk in insurance is ‘pure’ as it has the possibility of losing or having the same status.²⁷⁷
10. The assured participates with the insurer in paying a percentage of the indemnity or what is called ‘deductible’. This helps in reducing the moral hazard and risk creation incentives, and makes insurance more distant from gambling.²⁷⁸

The author supports the above arguments that insurance is not a gamble. It is clear that the proponents of prohibition tried desperately to find similarities between insurance and gambling, even though sometimes they were irrelevant, and can be noticed as much in insurance as in any other contract. Additionally, some of their arguments stem again from misunderstandings of the concept of insurance as a unilateral contract, the nature of the considerations exchanged between parties, and how the insurance system works. They also used the method of analogy ‘*qiyas*’ to extract the legal rule under *Sharia’a* law between gambling and insurance in an incorrect way. This view can be explained in the following points.

²⁷⁵ Ibid.

²⁷⁶ Ibid; That applies to almost all kinds of insurance other than life.

²⁷⁷ See G. Rejda & M. McNamara, *Principles of risk management and insurance* (12th edn, Pearson Education 2013) 18 for more; A. Algarri, ‘Alta’amin Alsahi’ (2001) 13 Majalt Majma’a Alfih Alislami 1515, 1528-1529.

²⁷⁸ A. Algarri, ‘Alta’amin Alsahi’ (2001) 13 Majalt Majma’a Alfih Alislami 1515, 1528-1529.

Firstly, the claim of the vast difference in considerations between the parties in the insurance contract, which makes it similar to gambling,²⁷⁹ can be refuted. This argument was based on the idea that considerations in the insurance contract are premiums from the assured and indemnity from the insurer, which was argued earlier not to be the case.²⁸⁰ The consideration from the insurer is his promise to pay a covered claim when the insured risk occurs, since insurance is a unilateral contract.²⁸¹ A similar example of insurance contract is the contract of *Ja'ala*, specifically when the person may consume a lot of effort and time looking for the thing, without getting anything in return, since the reward, '*ja'al*', which the other party promised to pay, is only awarded if the thing is found.²⁸² *Ja'ala* contract is also a unilateral contract and the promise from one party, '*jaa'el*', to pay if the other party finds the thing is the only enforceable promise.²⁸³ In contrast, there is a general consensus of the admissibility of *ja'ala* contract in *Sharia'a* law.²⁸⁴ Even if we assume that insurance is a bilateral contract,

²⁷⁹ See above; S. Olyan, *Alt'amin fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwaf 1996) 170-171.

²⁸⁰ See above under 2.2.1 'Gharar and Insurance'.

²⁸¹ Ibid.

²⁸² Y. Alnawwai, *Rothat Altalbeen Wa Muntga Alyanboa'a fema Zad An Alraothah Ljlal Aldeen Alsayoti* (Alkutb Alalmia 1992) 335; I. Alsherazi, *Almohathab Fe Fiqh Alimam Alshafa'i* (1st edn, Eisa Albabi Alhalbi Press 1915) 411; See above under 2.2.1 'Gharar in insurance'.

²⁸³ Ibid.

²⁸⁴ *Hanbali*, *Maliki* and *Shafai* scholars permitted *Jal'ala* for the public need, while *Hanafis* did not permit it generally unless the work required is known subject to certain exceptions; M. Alhattab, *Moahib Aljaleel Fe Sharah Moktasar Khalil* (Kitab Alja'la, 3rd edn, Dar Alfikr 1992) 453; M. Albahoti, *Kashaf Algena'a fe Matn Aligna'a* (Dar Alfikr 1982) 203; M. Alshurbini, *Mugni Almuhtaj Ila Ma'arft Alfath Almenhaj* (Dar Alkutb Alalmia 1992) 217; Y. Alnawwai, *Rothat Altalbeen Wa Muntga Alyanboa'a fema Zad An Alraothah Ljlal Aldeen Alsayoti* (Alkutb Alalmia 1992) 335; Ibn Abidin, *Hashiyat Radd al-Muhtir*, vol 3 (2nd edn, Albabi Alhalbi Press 1966) 290.

the difference between the considerations, as also discussed earlier, is part of the mechanism of the insurance system.²⁸⁵ Additionally, if we assume that the consideration from the assured are the premiums, it is still not a requirement that they must be equal to the indemnity. It is believed that equilibrium in considerations in *Sharia'a* law is not required except in two situations.²⁸⁶ The first is in the consideration contracts comprising the type of money for which *riba* can take place, and when it was exchanged by a similar type of money e.g. loan contract.²⁸⁷ The other situation is the guarantee of impairments, where equilibrium is required only in the type of objects that are guaranteed by themselves. However, if the object is guaranteed by other features, the will of the parties plays a crucial role.²⁸⁸ For instance, in a sale contract the subject matter is guaranteed by its price, not by its value. The price is the consideration agreed upon, whether it was large or small, as the base of assessment here is the will of the parties.²⁸⁹ In the same manner, in life insurance the base of assessment is the will of the parties, therefore the equilibrium between considerations is not necessary, keeping in mind that the transaction combines both consideration and cooperation elements.²⁹⁰

Secondly, hoping for a bargain deal i.e. paying a small amount in hope of a larger outcome or amount of money, is not something particular to insurance or gambling alone; this applies to nearly to all kinds of contracts. For example, in a sale contract, the buyer always hopes to pay

²⁸⁵ See above under 2.2.1 & 2.2.2.

²⁸⁶ See M. Alzarga, *Nizam Alta 'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 47–48, 134.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

a small amount for a high quality product.²⁹¹ Observing this feature in gambling is not evidence that all these contracts are gambling too.

Thirdly, saying that insurance is like gambling in that it depends on pure luck, and the parties do not play any role in it²⁹², is not completely true. Parties in the insurance contract try to eliminate the luck element to the narrowest level, by stipulating certain conditions. For instance, it is common in fire policies to stipulate conditions illustrating precautions which must be taken to secure the insured house from the risk of fire, such as setting up fire alarms in the property and insuring that they work properly at all times. Parties play a role in the occurrence of the risk, as the insured is obliged to refrain from any act that leads to or increases the risk and to comply with the precautions set by the insurer which can eliminate the occurrence of the risk. On the other hand, gambling parties do not do anything to eliminate the luck element.

Fourthly, the method of analogy to extract the legal rule of insurance contract under *Sharia'a* law is applied by prohibitors in an incorrect way. The reason of analogy '*illa*' must exist in both gambling and insurance wholly and not partially, for insurance to take the rule of gambling.²⁹³ When looking at gambling, it can be seen that the reason for its prohibition, as indicated by the *Quran*, is that it brings hatred between people and keep them away from praising god, and prayers.²⁹⁴ Jurists added that it is a form of taking people's money with vanity by luck and chance, losing time and money without benefit by gaming, and leads to addiction, just like wine. Also, it consists of *gharar*, gaining money without effort, and being

²⁹¹ Also, in tenancy agreements, the tenant always hopes to pay a small amount for a bigger or higher standard house.

²⁹² See above.

²⁹³ W. Alzuahili, *Alwajeez fe Asool Alfiah* (Dar Alfikr Almo'aser 1994) 171.

²⁹⁴ The Holy *Quran*, *Surat Alma'aida*, verse 90-91.

a total loser or a total winner.²⁹⁵ These reasons are not all evident in insurance, as it does not keep people away from praising god or prayers or bring hatred between people; it is a serious matter and not a game; it does not lead to addiction and therefore it is not detrimental to the person or the society. Conversely, insurance protects the person from risks and poverty and any factor that leads to the diminishing of his wealth, it protects the person from the consequences of luck and chance; the gambler puts himself in risk while the insured wants to protect himself from risk.²⁹⁶ Hence the reason of ‘*qiyas*’ in gambling is not wholly present in insurance, which means it is an analogy with difference, which makes it null.²⁹⁷ The difference here is effective and prevents the analogy between insurance and gambling.²⁹⁸

Even though the traditional view of *Sharia*’a jurists did not discuss the matter of insurable interest²⁹⁹ which was used in English law to prevent insurance from being a wagering

²⁹⁵ See M. Alandlusi, *Tafseer Albahr Almuhit* (1st edn, Dar Ihya’a Altrath Alarabi 2002) 250; M. Almaqdasi, *Almugni* (Dar Alaam Alkutb 1996) 413; S. Aljawzyiah, *Alforsiyah* (3rd edn, Dar Alndlus 2003) 223; A. Ibn Taymiyah, *Majmoa’a Fatoa Shik Alislam Ibn Taymiyah* (Mojama’a Almalik Fahad 1995) 238 ; E. Altabri, *Ahkam Alqura’an* (1st edn, Dar Alkutb Alamiah 1983) 368; A. Almaordi, *Alhatoi Fe Fiqh Mathab Alimam Alshafa’i* (1st edn, Dar Alkutb Alamia 1993) 654.

²⁹⁶ See also what Abo Obaid (an old Jurist) said in *Alamoal* to differentiate between Qarus and gambling. Qarus means roughly estimating fruits on the trees for the purpose of determining the poor’s shares for zakat or the government’s share in land tax. It is useful in determining the shares of partners with keeping fruit on trees until its maturity and allowing who is in control of fruits to dispose it after determining the share of others; A. Alharri, *Alamoal* (1st edn, Dar Alkutb Alalmiah 1986) 592; R. Almasri, *Alkatar Wa Altam’in: Hal Alta’min Altejari Ja’az Shra’an?* (1st edn, Dar Alklam 2001) 73–75.

²⁹⁷ W. Alzuahili, *Alwajeez fe Asool Alfiqh* (Dar Alfikr Almo’aser 1994) 171.

²⁹⁸ Ibid.

²⁹⁹ International Islamic Fiqh Academy , Decision No 9 (2/9) , Jeddah , 22-28 Dec 1985 , published in 2 (2) Majalt Almajma’a 545; *Haiat Kibar Alulma* in Saudi Arabia, decision No 55, 10th session, 25/3/1977; Islamic

contract,³⁰⁰ the author does not think that it can be a powerful defence against gambling in *Sharia'a* law,³⁰¹ considering the meaning of gambling to *Sharia'a* scholars.³⁰² Requiring that the assured must have an insurable interest in the subject matter insured may reduce the

Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978; F. Molowi, *Nizam Alta'min Wa Moqf Alsharia'a Alislamiyah Mnh* (1st edn, Dar Alrushad Alislamiyah 1988) 143; S. Olyan, *Alt'amin fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996) 169-171; A. Alnajjar, *Aqd Alta'min Wa Mashroaith Fe Alafqh Alislami* (1st edn, Dar Alnahda Alarabiah 1994) 211-218; F. Abdulrahman, *Alta'min Fe Ilislam* (Dar Almtboa'at Aljamaia 2006) 83; M. Almutiei, *Ahkam Alskoratah* (Nile Press 1906) 24.

³⁰⁰ Insurable interest was used in English law to prevent insurance from being a wagering contract and to prevent moral hazard. The assured must have an insurable interest in the subject insured meaning a benefit in its existence and safety as he will suffer from a financial loss if the insured risk occurs; See MIA1906, s 4 provides “(1) Every contract of marine insurance by way of gaming or wagering is void. (2) A contract of marine insurance is deemed to be a gaming or wagering contract (a) where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest... .” ; The Marine Insurance (Gambling Policies) Act 1909 imposed punishments on taking marine policies without insurable interest and made it a criminal offence. For life insurance, insurable interest was required also by the Life Assurance Act 1774; Any insurance contract with no insurable interest generally will not be enforceable as it will be a kind of wagering; however, after the Gambling Act 2005, insurance contracts without insurable interest are now enforceable, which made the law inconsistent. The Law Commissions issued an issue paper addressing the matter and questioned whether there is still a need for insurable interest in insurance contract law; See The Law Commission and Scottish Law Commission, *Insurance Contract Law: Insurable Interest* (Issue Paper 4, 2008).

³⁰¹ For an example of having insurable interest as an argument, see A. Alghadyain, ‘Insurance: The Islamic Perspective and its Development in Saudi Arabia’ (1999) 14 ALQ 332, 334; Also F. Alanazi, ‘Hal Asbab Tahrim Alta'min Mantgyiah’ , *Aliqtsadiyah Newspaper* (Riyadh, 15 March 2010) <http://www.aleqt.com/2010/03/15/article_363842.html>; Also insurable interest was included in the laws of some Islamic countries; See Art 749 Egyptian Civil Code; Art 3 Iraqi Law For Organizing Insurance Operations 2005.

³⁰² See above 2.2.3 under definition.

incentives for the assured to incur the risk on the subject matter insured as he will have an interest in its safety; nonetheless, it will not change the fact that insurance is still a risk leading one of the parties to lose and the other one to win, which is considered a gamble in *Sharia'a* law.³⁰³ On the other hand this is not evident in cooperative insurance.³⁰⁴ In that regard it was observed that the real difference between insurance and wagering is not in insurable interest, but in that the interests of the parties in wagering are always opposed (if one of the parties win, the other loses, and if one of the parties loses, the other party wins). It is impossible for both of them to win or lose. However, in insurance the interests are not opposed, as both the assured and the insurer do not want the insured risk to occur. However, this is still considered insurance for profit (commercial insurance) and, in the view of *Sharia'a* scholars, a kind of gambling which violates *Sharia'a* law.³⁰⁵

The author believes that the main problem is the view of *Shaira'a* scholars on insurance as a bilateral contract where the assured's premiums are in exchange for the insurer's indemnity which leads to winning and losing situations for the parties. However, as argued earlier the author believes that it is a unilateral contract where the insurer promises to pay indemnity when the risk occurs if the premiums are paid.³⁰⁶ Indemnity is not in exchange for premiums to have a losing or winning situation,³⁰⁷ and therefore it cannot be gambling as indicated by *Shaira'a* scholars.

³⁰³ Ibid.

³⁰⁴ As it is a donation contract in the view of *Sharia'a* scholars, and the cooperative insurance company is not the insurer as every assured is the insurer. In other words, the risk is shared between the assureds, and does not lead to a winning or losing situation; See below for more discussion under 2.3.

³⁰⁵ A. Haberbeck, 'Risk Sharing in an Islamic Society' (1987) 2 (2) ALQ 138,140.

³⁰⁶ See above under 2.2.2 ; 2.2.3.

³⁰⁷ Ibid.

Hence, after refuting the allegations of *gharar*, *riba*, and gambling in insurance and arguing that they cannot be claims of prohibition against the insurance contract under Islamic law, this study now moves on to highlight the basis of distinction between commercial insurance and cooperative insurance, which the second approach has based its arguments upon.

2.3 COMMERCIAL AND COOPERATIVE INSURANCE: IS THERE A REAL DIFFERENCE?

The three approaches which formed the general view of insurance in the Islamic world have underlined the issue of commercial and cooperative insurance.³⁰⁸ Even though two of these approaches had no recognition of any difference between commercial and cooperative insurance³⁰⁹, the matter was of importance to the approach which distinguished between the two and ruled the admissibility of only cooperative/mutual or Islamic insurance.³¹⁰ However, the term cooperative/mutual may be misleading as not every cooperative/mutual insurance company is Islamic or otherwise all cooperative/mutual conventional insurance companies will be Islamic which is not the case. What is meant here are the cooperative/mutual insurance companies that accord to Islamic principles. In this context the term ‘cooperative’ will be used as the one according to Islamic law principles.

³⁰⁸ See above 2.1.

³⁰⁹ Ibid; one prohibited all kinds of insurance whether cooperative or commercial, and the other one admitted all kinds of insurance whether cooperative or commercial.

³¹⁰ Ibid; Authors referred to the admissible kind either by the term cooperative or mutual insurance (see ‘*Hai’at Kibar Alulma* in Saudi Arabia, decision No 55 ,10th series, 25/3/1977; M. Abuzaharah, ‘Ugod Altamin’ (1961) 5 Majlt Hathart Alislam 10,12 ; International Islamic Fiqh Academy, decision No 9 (2/9) , Jeddah , 22-28 Dec 1985, published in 2 (2) Majalt Almajma’a 545 Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978). However, what they really meant was a mix between cooperative and mutual insurance. There is a slight difference between cooperative and mutual insurance. In cooperative insurance there is a capital, the responsibility of every member is limited by his share and the responsibility of the committee is limited by its capital, the assureds mostly do not know each other and are from different categories and require insurance from different risks. However, in mutual insurance, there is no capital, the responsibility of the members and the committee is generally unlimited, and mostly the assureds know each other and relate to a specific category such as a certain profession with need for insurance against a certain risk. They are similar in their cooperative objectives and not seeking profit. However, the distinction is sometimes hard, with no practical benefit.

The approach of differentiating between cooperative and conventional insurance is considered the most popular one, with the majority of scholars adhering to it in the Islamic world.³¹¹ The main source of the admissibility of cooperative insurance can be found in the *Hadith* of *Alasharieen*, where if the financial status of their tribe changed, or their food was insufficient, they pooled what they could give in one pot, and then shared it equally.³¹² This *Hadith* is considered a strong proof against those who argue in favour of the sufficiency of the charitable systems to serve the needs of the society in insurance.³¹³ The main differences between the two systems can be summarised in the following points:

2.3.1 Differences Between Conventional And Cooperative Insurance

I In Form

In commercial insurance, the contract is between the insurance company which is owned by shareholders other than the assureds as the insurer on the one hand, and the assureds on the other as clients only to the insurance company. Thus, the risk will be transferred to the

³¹¹ See '*Hai'at Kibar Alulma* in Saudi Arabia, decision No 55 ,10th series, 25/3/1977; M. Abuzaharah, 'Ugod Altamin' (1961) 5 Majlt Hathart Alislam 10, 22 ; International Islamic Fiqh Academy, decision No 9 (2/9) , Jeddah , 22-28 Dec 1985 , published in 2 (2) Majalt Almajma'a 545 Islamic Fiqh Academy, decision No 5, Mecca,1st session, 16/7/1978.

³¹² Y. Alnawwai, *Sahih Muslim with Alnawwi Explanation* (Kitab Fada'el Alsahabh, Dar Alsalaam 1996) 50,*Hadith* 2500.

³¹³ Those are of the view of prohibiting all kinds of insurance; See for example M. Almutiei, *Ahkam Alskoratah* (Nile Press 1906) 12; A.Taj '*Shrakit Altamin Mn Wjht Nathar Alsharia'a*' (The Seventh Conference for Islamic Researches, Cairo, September, 1972) ; M. Abuzahrah '*Altaleeg Ala Mothoa Agd Altamin*' (Islamic Jurists Week, Damascus, April, 1961); S. Olyan, *Alt'amin fe Alsharia'a Wa Alqanon* (3rd edn, Dar Alshwwaf 1996) 179.

insurance company in return for a price which is the premium paid by the assured.³¹⁴ The insurance company will be liable to indemnify the assured in case of a loss; otherwise, the aggregated premiums will be a profit to the insurer since they did not observe any claim.³¹⁵ The commercial profit of the insurance company is generated from underwriting surplus and investments' returns generated from the premiums. Assureds do not have any relevance with the company's money or its investments of premiums.³¹⁶

Nonetheless, in cooperative insurance, the parties of the contract are the assureds themselves as every assured is an insurer for the others, and the capital or the insurance fund is a result of pooling together the members' fees. In other words, the risk is 'shared' between the assureds and not 'transferred' to the insurance company as in commercial insurance.³¹⁷ Any claim will be paid from the insurance fund, and not borne by the cooperative insurance company.³¹⁸ However, in practice, the regulators often impose an obligation on the cooperative insurance company to provide an interest free loan to the insurance funds in case of the occurrence of any deficit when paying the claims. Such obligation protects the insurance funds from insolvency and the loan will be returned to the company from the future premiums.³¹⁹

Also, cooperative insurance is based on the principle of '*tabruu*' or donation. Under this principle, every assured in the scheme donates his membership fee for the other members,

³¹⁴ M. Bakar, 'Sharia's Principles Governing Takaful Models' in S. Archer, R. Abdelkarim & V. Nienhaus (eds), *Takaful: Islamic Insurance Concepts and Regulatory Issues* (Wiley & Sons 2009) 31-45 .

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ Ibid.

with the condition of reimbursing him if an insured accident occurs.³²⁰ Consequently, the contract as viewed by its proponents is not disturbed by the allegations of *gharar* or gambling since they are only applicable in consideration contracts and not in donations.³²¹ Also, the *riba* claim cannot be raised since the increase in the indemnity which obverses the premiums paid is a kind of donation and not a consideration, and the increase in donations is not considered *riba*.³²² The management of the insurance operations and investment of funds were used to be run by a committee from the assureds themselves; however, today since the number of the assureds is increasing, the management of the insurance operations and the investment of funds are given to an insurance company or an operator.³²³

The management of the insurance operations and investment of funds, and the remuneration of the cooperative insurance company all depend on the management model adopted in cooperative insurance companies which mainly ranges between three main models; *wakalh*, *mudarabh*, and a combination of both.³²⁴ Whatever model is adopted, the main principle from a *Sharia*'a view is that the surplus belongs to the assureds/participants and is not profit

³²⁰ Ibid; This technical view of donation is also supported by the Accounting and Auditing Organization for Islamic Financial Institutions, 'AAOIFI'.

³²¹ Ibid.

³²² Ibid.

³²³ Ibid.

³²⁴ S. Archer, R. Abdulkarim, & V. Nienhaus, 'Business models in Takaful and Regulatory Implications' in S. Archer, R. Abdulkarim, & V. Nienhaus (eds), *Takaful: Islamic Insurance Concepts and Regulatory Issues* (Wiely & Sons 2009) 11–12; Those models can be pure or can be modified after adjusting some conditions of the pure models.

to be shared by the insurance company.³²⁵ In a *wakalh* model which is an agency with a fee model, the insurance company (agent) will be responsible for underwriting and investing the assureds' insurance funds on behalf of the assureds (principles).³²⁶ The fee can be a specified amount or a percentage of the turnover (aggregated contributions or invested funds) but not of the profit of those undertakings.³²⁷ All the profits and risks will be borne by the assureds as principles and not by the insurance company.³²⁸ The other model is the *mudarabh* model or investment model, where the insurance company becomes the investment manager of the insurance funds. Here the cooperative insurance company will share the profits generated from investing the insurance funds with the assureds based on a specified ratio. The company will only be remunerated if there are returns from the investments or otherwise it will not be entitled to any return for its efforts. However, the losses will only be borne by the participants

³²⁵ Ibid; As it is part of their donation for mutual help; however, there are some models which allow sharing of surplus by the insurance company, and which are controversial from a *Sharia'a* view (e.g. *mudarabh* on underwriting, *wakalh* with performance fees) ; See discussion below.

³²⁶ Ibid; The funds invested include reserves, temporary excess liquidity from the insurance funds and assureds' contributions.

³²⁷ Ibid 13; The fee will be inclusive of shareholders' profit and management costs except claim costs and claim handling costs; the *wakalh* model can include performance fees, as since the *waklah* model without those fees encourages the increase in the amounts of contributions and investment funds by linking the fee of the agent (*wakeel*) to their amount, there may be a danger of the level of quality of those activities negatively affecting the interest of the assureds. It must be borne in mind that the performance of the underwritings or investments does not have a direct effect on the payments of the insurance company. Hence 'performance' fees can help enhance quality, since it will be calculated based on the surplus of those contributions or profits generated from those investments.

³²⁸ Ibid.

and not by the insurance company.³²⁹ The last model is a combination of both *wakalh* and *mudarabh* models. In such a model the insurance company will be a *wakeel* (agent) regarding the services and management of the insurance operations on a daily basis,³³⁰ while it will be a *mudareb* (investor) regarding investing the insurance funds and sharing the profits from the investments. By that arrangement, the insurance company will be entitled to fees under the *wakalh* or agency contract, and will have the chance to share the profit generated from investing the insurance funds if there is any.³³¹ This approach is believed to combine the benefits of both approaches; nonetheless, it can add further governance problems from the point of view of the assureds.³³²

II In Goal

Cooperative insurance is a donation system in which its original goal is not to generate profit, but cooperation between the assureds.³³³ Nonetheless, in commercial insurance, the company's main goal is to seek profit for its shareholders whether in an admissible or

³²⁹ Ibid 14; There are also modified *mudarabh* models which are controversial from a *Sharia'a* point of view; one model is where the cooperative insurance company will charge for claim handling cost and management expenses before the calculation of the deficit or the surplus in the underwriting, which makes it similar to the *wakalh* with performance fees in its underwriting part; Malaysia has allowed another modified *mudarabh* model which applies *mudarabh* as regards underwriting which is also controversial from a *Sharia'a* point of view since it allows surplus sharing with the insurance company, where that surplus must only belong to the participants/assureds; See the discussion below under 'Profit Element: Is It A Mean Goal To Seek?'.

³³⁰ Ibid; *Wakalh* here is usually with performance fees.

³³¹ Ibid 15.

³³² Ibid.

³³³ F. Abdulrahman, *Alta'min Fe Ilislam* (Dar Almtboa'at Aljamaia 2006) 152–160.

inadmissible way.³³⁴ Security and cooperation are intended only as ancillary goals as in any commercial activity. Commercial activities generally consist of a kind of cooperation by fulfilling needs through exchanging goods or services; nevertheless that is not the intended meaning of cooperation, but it is the meaning of trade.³³⁵

III In Insurance Premiums

In cooperative insurance, the premium is low as it reflects the true costs of the operation, keeping in mind that it is a donation system and it must be suitable for those who live on limited incomes to give the opportunity for all people to engage in it.³³⁶ Moreover, the amount is changeable every year depending on the obligations that members face. If the risks are not covered by the aggregated amounts, the assureds have to pay extra amounts to remove the deficit. If the risks are covered in an amount less than the aggregated premiums, the excess in premiums must be returned to the assureds or after their approval, it can be held as a reserve for the future.³³⁷ Also, the members have a shared liability in covering the risks by way of paying the agreed amount, whether it is limited by a certain amount or not, depending on the way they pay their premiums.³³⁸ However, it is noticed that today the obligation of every member is set on previously not exceeding a certain amount, in order to attract people to engage in such insurance, with the excess premiums being invested or held as a reserve.³³⁹

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid.

Conversely, premiums in commercial insurance are considered high and in normal situations the premiums paid are more than the indemnities, in order to create maximum profits for the company. Moreover, interests are imposed on top of the premiums for delays, and that is considered *riba*.³⁴⁰

IV In Investments

The profits generated from the investments of insurance funds, including the reserves in cooperative insurance, return to the assureds as owners, and the investments are executed without *riba*. However, in a pure *mudarabh* and *mudarabh/wakalh* model, the profits generated from the investments of the insurance funds are shared between the insurance company and the assureds. In contrast, the investments in commercial insurance return to the shareholders of the insurance company and not the assureds, since the assureds are merely clients to the company, with the company engaging in investments that are believed to be tainted by *riba*.³⁴¹

³⁴⁰ Ibid.

³⁴¹ Ibid.

2.3.2 Is There A Real Difference?

After explaining the main differences between cooperative and commercial insurance, it seems that the main arguments behind the distinction are: firstly; depriving commercial insurance of any cooperation objectives and equalising the cooperation in it as the one examined in any commercial activity; secondly, viewing insurance as a donation contract, rather than a consideration contract. The question is: is this really true?

I The Cooperative Objective

Regarding the cooperative objectives in commercial insurance, they can be differentiated from the kind of cooperation in regular commercial activities. The main and original goal of the commercial insurance activity is to remove the financial burden that accidents cause to the assured, by distributing it on to the other assureds from the premiums they pay.³⁴² This goal cannot be denied since it is the foundation of insurance, and the insurer's profit from such operation is natural since it delivers it, but this does not deprive insurance from the notion of cooperation.³⁴³ On the other hand, the other commercial activities' main goal is to exchange goods and services to fulfil equal needs, and not cooperation as illustrated through insurance.³⁴⁴ We must keep in mind that the way insurance system works, which reflects the cooperation objectives, is examined in all kinds of insurance whether cooperative or commercial, since it is the basis of any insurance.

³⁴² M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 142.

³⁴³ Ibid.

³⁴⁴ Ibid.

II The Donation Nature Of The Contract

It seems that the basis of the cooperative insurance contract and industry is based on the principle of ‘*tabruu*’ or the donation nature of the contract between the participants in the insurance funds. By this, the claims of *riba*, *gharar*, and gambling are not applicable, as they are only applicable in consideration contracts.³⁴⁵ The author argued earlier against these claims as gambling is not applicable, while *riba* is not observed and it is not in the main elements of the insurance contract but rather as a result of ancillary activities, and *gharar*, even if evident, must be tolerated for the public need.³⁴⁶ It is clear that the proponents for this approach have adopted the view in *Sharia’a* law that a conditional gift with consideration is admissible.³⁴⁷ This means it is admissible for a donor to make a donation which he may benefit from in the future.

Nonetheless, in the author’s view cooperative insurance contract is not really a donation or a *tabruu* contract. It is clear that the member in the cooperative insurance system pays the premium to the insurance funds to indemnify himself first, and then the members in the scheme in an ancillary manner. If he were not included in the indemnity when the insured risk occurs, he would not pay the premium in the first place. Moreover, the assured pays the premium to the insurance funds on the basis that no indemnity will be given to non-members. Thus, the contract is a donation (if so) which has a condition of indemnity, parallel to the indemnity in the commercial insurance, and this is regarded as a form of consideration which

³⁴⁵ See above under 2.3.1.

³⁴⁶ See discussion above under 2.2.

³⁴⁷ The *Maliki*, *Hanafi* and *Hanbali* schools of Islamic law were of the view that the gift with the condition of consideration is admissible; W. Alzhuahili, *Alfiqh Alislami wa Adltah* (Dar Alfiker 1985) 327; A. Azzam, *Fiqh Almua’amlat* (Maktbt Alrisalh Aldawliah Ltba’ah 1998) 240.

makes the donation nature of the contract inapplicable according to other views in *Sharia'a* law.³⁴⁸

In fact, most Islamic jurists consider that the gift with the condition of consideration is like the sale contract, and the rules of sale apply to it.³⁴⁹ The author believes that real donations must be without profit or consideration. This consideration element is evident too in pensions and social insurance systems for workers, as the government takes off instalments from members as membership fees, even though it does not mainly seek profit.³⁵⁰

Another argument justifying the claim that cooperative insurance is a consideration and not a donation contract is that one of the characteristics of donation is that the donor has the right to drop his donation fully or partially.³⁵¹ Additionally, he has the right to abstain from continuing to pay what he promised to pay from premiums, or participating in removing the

³⁴⁸ The *Shafai*, some *Hanbali*, and *Thahrea* schools of Islamic law viewed the gift with the condition of consideration as inadmissible since it contradicts the nature of donation which must be without consideration; Ibid.

³⁴⁹ *Maliki*, *Hanbali* and *Shafai* schools of Islamic law; W. Alzhuahili, *Alfiqh Alislami wa Adltah* (Dar Alfiker 1985) 327; A. Azzam, *Fiqh Almua'amlat* (Maktbt Alrisalh Aldawliyah Ltba'ah 1998) 240; A. Haidar, *Durr Alahukam Sharh Majlt Alahkam* (Dar Alem Alkutb 2003) 387.

³⁵⁰ H. Hassaan, 'Hukm Alsharia'a Alislamiyah Fe Uqod Alta'min' (First International Conference for Islamic Economy, Mecca, Feb, 1976) ; The author will argue later that the government is actually seeking profits in the pension system in a way even more evident than commercial insurance companies.

³⁵¹ *Hanafī* scholars were of that view disagreeing with *Maliki* , *Shafai* and *Hanbali* scholars with some exceptions; W. Alzhuahili *Alfiqh Alislami wa Adltah* (Dar Alfiker 1985) 327; A. Azzam, *Fiqh Almua'amlat* (Maktbt Alrisalh Aldawliyah Ltba'ah 1998) 240.

deficits in the fund.³⁵² However, this is not the case in cooperative insurance, as these acts drop the assured's right in indemnity and give the management the right to rescind the contract with him.³⁵³

Hence, we can see that there is no major difference in the basic principles between cooperative and commercial insurance. They all constitute cooperative goals and they are all consideration contracts. The only recognisable difference left can be seen in the technical method of organisation and in the profit element. This will be explained as follows:

A. The Technical Method

The difference in the technical method of the cooperative insurance company compared to its conventional counterpart lies in the facts that the cooperative company is just the manager and/or the investor and not the insurer, and in that every assured is an insurer for the others based on the donation nature in the insurance contract admitted by some Islamic jurisprudence.³⁵⁴ This thesis argued earlier that insurance is not a donation, but a consideration contract, and refuted the prohibition claims of the insurance contract.³⁵⁵ Hence, there is no point in having a different technical articulation from a commercial insurance company. In fact, cooperative insurance companies are gearing to be more or less similar to commercial insurance companies. This is evident in the remuneration models of the cooperative insurance companies and their obligation to give an interest free loan to the

³⁵² A. Almane'a, *Altamin Bain Alhalal Wa Alhram* (King Faisal Centre for Islamic Studies and Researches 2002) 14.

³⁵³ Ibid.

³⁵⁴ See above under the 'donation nature of the contract'.

³⁵⁵ See above under the 'donation nature of the contract' and under 2.2.

insurance funds in case of deficit to avoid insolvency.³⁵⁶ Regarding the remuneration, as mentioned earlier, some cooperative insurance companies adopt underwriting surplus sharing whether under the *wakalh* with performance fees or under the *mudarabh* model on underwriting.³⁵⁷ Concerning the role of the lender played by the company, the company will be required to be solvent with a certain minimum capital just like a commercial insurance company.³⁵⁸ The only difference is that the commercial insurance company will be paying the deficit for itself as an insurer, while the cooperative company will be a lender.³⁵⁹ The loan which will be deducted later from the future contributions adds a further similarity between the two systems since it allows the company to share the underwriting surplus to claim the loaned amount.

B. Profit Element: Is it A Mean Goal To Seek?

It seems that the allegations of distinction between cooperative and commercial insurance are also directed towards criticising the profit element in commercial insurance. These allegations view profit seeking as an impediment which makes the cooperation objective inapplicable in commercial insurance.³⁶⁰ The author is of the view that cooperative insurance may fight the

³⁵⁶ S. Archer, R. Abdulkarim, & V. Nienhaus 'Business Models in Takaful and Regulatory Implications' in S. Archer, R. Abdulkarim, & V. Nienhaus (eds), *Takaful: Islamic Insurance Concepts and Regulatory Issues* (Wiely & Sons 2009) 11–12 ; see above 2.3.1.

³⁵⁷ Ibid, See above 2.3.1.

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ See M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 144–145.

exploitation by commercial companies and may be the only alternative. Hence, it must be encouraged by the governments, to widen its application. However, the preference of this kind of insurance does not lead to claiming the prohibition of commercial insurance. In fact, commercial insurance seems to be necessary, especially when insuring highly valued objects which require reinsurance, since cooperative insurance is incapable of performing such high level of operation.³⁶¹ Thus, there is still a need for commercial profitable methods practised by stronger companies and reinsuring with international reinsurance companies, to be able to bear the high indemnities paid in bigger insurance deals.³⁶²

Actually, this fact has been grasped already by the cooperative insurance industry which strives to be as competitive as commercial insurance. Many cooperative insurance companies now adopt more attractive management and remuneration models such as the *wakalh /mudarabh* model which allows for the company to share profits from investment funds with the assureds under the *mudarabh* contract and at the same time be entitled to fees for the underwriting services under the *wakalh* contract.³⁶³ Even though most cooperative companies are still not allowed to share the underwriting surplus, it is clear that the industry needs profits as incentives for those companies to perform efficiently from a commercial perspective.³⁶⁴

In fact such desperation for competitiveness made Malaysia permit a *mudarabh* model for underwriting services, not only for investment funds, and this allows sharing the underwriting

³⁶¹ M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 144–145.

³⁶² Ibid.

³⁶³ S. Archer, R. Abdulkarim & V. Nienhaus 'Business Models in Takaful and Regulatory Implications' in S. Archer, R. Abdulkarim & V. Nienhaus (eds), *Takaful : Islamic Insurance Concepts and Regulatory Issues* (Wiley & Sons 2009) 11-12; See above 2.3.1 under 'in form'.

³⁶⁴ Ibid.

surplus.³⁶⁵ This was challenged in most countries from a *Sharia'a* perspective as the main argument was that surplus is not a profit to be shared, and belongs only to the assureds.³⁶⁶ Also, from an economical point of view, sharing surplus with the cooperative insurance company will provide an incentive for the company to increase surplus.³⁶⁷ This can have a negative effect on the assureds, since if reserves are adequate, the best underwriting surplus for them would be near to zero. If there is excessive surplus that will technically imply that the premiums are higher than they should be, considering the level of risk calculated actuarially.³⁶⁸

Continuing the argument on despising the profit element, Islam does not forbid profit, as it is a source of economic growth and an attractive motive to companies to embark on the insurance activities and deliver them to people. This encouragement of trade in Islam can be observed in the *Quran*³⁶⁹ as well as the *Sunnah*³⁷⁰, which is regarded as a detailed source of Islamic commercial law. In fact, Prophet Mohammed (P.U.H.) himself was a trader. Those who forbid commercial insurance just because it generates profits seem like those who forbid supermarkets just because there are cooperative markets, or forbid sale because of the

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid; This is similar to the *wakalh* model where the performance fees are applied to avoid compromising quality in underwriting service.

³⁶⁸ Ibid.

³⁶⁹ For example, *Surat Alhajj*, verse 27-28; *Surat Albagrah*, verse 198 ; *Surat Alnoor*, verse 37.

³⁷⁰ For example, reported by Al-hakim and Al-tirmithi, the Prophet P.U.H said "*An honest and trustworthy merchant will be with the prophets, the truthful, and the martyrs.*" ; M. Altirmithi, *Sonn Altirmithi: Aljama'a Alsahaih* (Dar Alkutb Alamia 1988) 515, *Hadith* 1209.

admissibility of grants, or forbid agency with a fee just because that agency without a fee is admissible.

Aldrarir is one of the adherents of the view of the admissibility of only cooperative and not commercial insurance.³⁷¹ He suggests that to make cooperative insurance work properly and in an Islamic, admissible way, the profit seeker body must be removed, and thus governments will be the most suitable bodies to organise such operations with capabilities of handling all kinds of risks as ‘non-profit seeker’ bodies.³⁷²

In the author’s opinion, this view is unrealistic and hard to apply in practice. The government as a non-profit seeker may fulfil the basic needs of the society and may secure them from basic risks, e.g. poverty or death of the breadwinner. However, the complexity and diversity of the risks that we face today with the overgrowing population make it hard for the government to fulfil all kinds of different risks to all individuals. This heavy onus may lead to deterioration in service quality, lack of liquidity, or not covering all kinds of risks. In fact, this is what is actually happening now, as even though governments are already playing a vital role in the society by fulfilling its basic needs as non-profit seekers through basic social security systems, they do not satisfy the need for security against other risks such as liability risks, or risks that are associated with trade for traders, as the onus is too heavy. Moreover, it must be borne in mind that the social security systems are confined to specific categories of people, where certain conditions must apply, and serve a sole specific risk, i.e. poverty. The new risks that we face today, such as car accidents, which can face almost all members of society, even if they are not poor or fall under a category which deserve social security, stress the fact that another system has to be applied. In fact, insurance can help people from being

³⁷¹ A. Aldrarir, *Algarar Wa Authrh Fe Aluqod Fe Ilfqh Ilislameh* (1st edn, Dar Nashr Althuqafh 1967) 646.

³⁷² Ibid 662–663.

poor in the first place by distributing the financial burden of the risk on others. Also, it has an economic impact, enhancing economic efficiency by encouraging businesses to engage in commercial activities without fear of bankruptcy.

The question is why Aldrarir and other scholars have constantly criticised profit seeking by insurers and envisaged it as a mean goal.³⁷³ It has been clarified that governments, as non-profit seekers, in practice cannot satisfy all the insurance needs of society. If they did, this would not be purely without a price or a profit. For example, in Saudi Arabia, the government has created a cooperative insurance company named ‘The National Company for Cooperative Insurance’ (NCCI) as a closed joint stock company with its major shares owned by the government itself.³⁷⁴ This company was created to fulfil the needs of different kinds of individuals and risks, as the government could not rely on social security alone. However, the company, even though tagged as cooperative, is really practising commercial insurance, which is clear from its memorandum of association.³⁷⁵ One could argue that the government could have adopted a cooperative insurance model for the structure of the company which could be commercially coherent, and similar to the models adopted in other Islamic countries

³⁷³ A. Aldrarir, *Algarar Wa Authrh Fe Aluqod Fe Ilfqh Ilislameh* (1st edn, Dar Nashr Althuqafh 1967) 662–663; M. Abu Zaharah, ‘Ugod Altamin’ (1961) 5 Majlt Hathart Alislam 10, 22; International Islamic Fiqh Academy, decision No 9 (2/9), Jeddah, 22–28 Dec 1985, published in 2 (2) Majalt Almajma’a 545; *Haiat Kibar Alulma*, decision No 55, 10th session, 25/3/1977; Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978.

³⁷⁴ By Royal Decree M/5 dated 10/1/1985; incorporated on Jan 18, 1986, Com Reg No 1010061695.

³⁷⁵ For example, the memorandum indicated generally that the insurer is the company and not the assureds. Also, in Art 43, 10% of the profits return to the assureds and 90% return to the shareholders; See NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013.

which only allow cooperative insurance.³⁷⁶ What is clear is that the government could not fill the other needs of the society without seeking profit, or commercial incentives.³⁷⁷

³⁷⁶ See above 2.3.1 under differences ‘in form’; if this approach was adopted, the Saudi government could have achieved a unification in the insurance legal system instead of creating legal duality; for more see Ch 3 ‘Insurance in Saudi Arabia’.

³⁷⁷ Another illustration of profit seeking by the government can be noticed in the Public Pensions System. The government satisfies the needs of civil workers to secure themselves against old age, death, or paralysation by taking instalments from their wages, and investing them, making huge profits. Part of that profit goes towards pension payments, reserves and administration charges, and the rest goes as a profit to the government itself, just as commercial insurance companies or cooperative insurance companies adopting the *mudarabh* or *wakalh/mudarabh* model. It was argued that the main goal in pensions is to help the worker and not to generate profits, with the government donating its share in paying the pension to the worker. Thus, the pension system is a proper example of cooperative insurance, with the government being a donor, and a non-profitable body; See A. Aldrarir, *Algarar Wa Authrh Fe Aluqod Fe Ilfqh Ilislameh* (1st edn, Dar Nashr Althuqafh 1967) 662–663. Nonetheless, the author does not believe that this argument is true. As discussed earlier, insurance is a consideration contract and not a donation contract. The system does not include other people who are not workers, and the worker pays his share in return for his membership in the system. His payment is on the basis of pension payments, including payment of his own pension. If the worker does not pay his share, he will not be entitled to the pension. Hence, it is obvious that the pension system is not a kind of donation; See above 2.3.1 under the ‘donation nature of the contract’; In relation to the profit seeking goal, the author strongly believes that this goal is sought by the government even more than any insurance company, which makes the claim of not seeking profit an absolute illusion. The closest example of the pension system is life insurance; therefore the two will be compared to illustrate this point, taking the Saudi Public Pension System as an example. At first glance, the Saudi Public Pension System is enforceable on any civil servant. In other words, once you are working for the public sector, the instalments are taken automatically from your wages, without any choice. If the government were not really seeking profit, it would have given the worker the choice either to be part of the system or not. Additionally, after the risk occurs, i.e. old age, paralysation, illness or death, the pensioner or the beneficiaries do not have the choice to get the pension amount as one sum, and are forced to get it in monthly instalments. Moreover, after the death of the pensioner, not all his heirs are entitled to his pension, as they must satisfy certain conditions to be regarded as a beneficiary. Furthermore, the beneficiaries are not allowed more

We must take into consideration that seeking profit is not something to be criticised, especially if it fulfils the needs of society, otherwise we will criticise all commercial contracts, such as sale or lease, as they all seek profit by the opportunity of filling unfilled needs in society, which is the essence of trade. Moreover, Islam is a religion that encourages trade and does not view profit as an evil goal.³⁷⁸ It seems that Aldrarir and the other scholars fear³⁷⁹ was from the greed of these companies in exploiting people's needs unreasonably. The author believes that this can be prevented by the market itself as a free market. The insurers will consider competitors when setting the premium prices, which gives the insured the chance to choose from a wide variety of insurers what he sees as the 'best package'. Also,

than one pension payment at the same time. Thus, supposing both parents are civil servants, their children, after satisfying the conditions, are entitled to only one of their parents' pensions. On the other hand, life insurance is always a choice for the person and not enforceable. The insured and the beneficiaries also have the choice to get the insured amount as one sum or as instalments. Also, the beneficiaries named in the policy are entitled to the amount if the insured risk occurs, disregarding their age, marital status, or work. Moreover, a person can insure himself in more than one company and the same beneficiaries named in the policies can be entitled to all the insured amounts. Hence, we can see that it is obvious that the government having these conditions in the Public Pensions System is clearly looking for profits, and in a way much more than any insurance company, which makes the allegations of donation and non-profit goal meaningless; For more see Saudi Public Pensions Agency, 'Regulation of Civil Pension' (Saudi Public Pensions Agency) found in <http://www.pension.gov.sa/PensionRules/civiliam/Pages/default.aspx> accessed 23 May 2013.

³⁷⁸ For example see *Quran*, *Surat Albagrah*, verse 198; *Surat Alhajj*, verse 27-28.

³⁷⁹ A. Aldrarir, *Algarar Wa Authrh Fe Aluqod Fe Ilfqh Ilislameh* (1st edn, Dar Nashr Althuqafh 1967) 662–663; M. Abu Zaharah, 'Ugod Altamin' (1961) 5 Majlt Hathart Alislam 10, 22; International Islamic Fiqh Academy, decision No 9 (2/9), Jeddah, 22-28 Dec 1985, published in 2 (2) Majalt Almajma'a 545, *Haiat Kibar Alulma* in Saudi Arabia, decision No 55, 10th session, 25/3/1977; Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978.

supervision by government authorities and related laws help in regulating such companies' activities and their policies in determining premiums.

Based on the above, it can be said that the allegations of the admissibility of only cooperative, and not commercial insurance, seem to fall apart. This thesis will now try to highlight the main claims of the admissibility of insurance as an economic activity today.

2.4 CLAIMS OF ADMISSIBILITY

2.4.1 The Admissibility Of Creating New Contracts: The Original State Of Contracts Is Admissibility Unless There Is Proof To The Contrary

Some authors have tried to apply the analogy doctrine (*qiyas*) between insurance and other contracts in Islam to extract its legal rule and its admissibility.³⁸⁰ These analogies include comparing insurance to the contracts of: guardianship (*hirasah*), lease (*ijarah*), rewarding promise (*jala'a*), trust (*wadeah*), guaranteeing the danger of the road (*Thman Katar Altareeg*), and enforceable promises (*Alwa'ad Almulzim*), recognised by the *Maliki* school of law.³⁸¹ However, the author is of the view that this analogy is not the right method to claim the admissibility of the insurance contract, as insurance is a new financial transaction and must be judged on that basis.³⁸²

The gaps in the application of the analogy doctrine on the insurance contract are recognisable and open the door for criticism. Nonetheless, insurance as a new transaction can be admissible, since as a general principle in *Sharia'a* law, the original state of things in general

³⁸⁰ For example, M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 50–51; M. Alsaleh, *Altamin Baen Alahdr Wa Alibaha* (1st edn, 2004) 115; R. Almasri, *Alkatar Wa Altam'in: Hal Alta'min Altejari Ja'az Shra'an?* (1st edn, Dar alkalam 2001) 68.

³⁸¹ Ibid; see also above 2.2.1.

³⁸² See also A. Aldrarir, *Algharar wa Authrh fe Aluqod fe Ilfqh Ilislameh* (1st edn, Dar Nashr Althuqafh 1967) 646; International Islamic Fiqh Academy, decision No 9 (2/9), Jeddah, 22–28 Dec 1985, published in 2 (2) *Majalt Almajma'a* 545; *Haiat Kibar Alulma* in Saudi Arabia, decision No 55, 10th session, 25/3/1977; Islamic Fiqh Academy, decision No 5, Mecca, 1st session, 16/7/1978.

is admissibility unless there is a proof to the contrary, and that includes contracts.³⁸³ Additionally, the majority of the Islamic schools of law do not confine people to certain kinds of classical contracts, such as sale or lease.³⁸⁴ On the contrary, they encourage people to create new kinds of contracts if there is a need and interest in them, and if they comply with *Sharia'a* law principles.³⁸⁵ Thus, it can be said that the insurance contract is admissible according to this criteria. The insurance contract is a new financial transaction which was not known in the early years of Islam, like sale; however, after countering the claims of *riba*, *gharar* and gambling, this thesis finds no proof of its prohibition.

³⁸³ See Ibn Abidin, *Hashiyat Radd al-Muhtir*, vol 3 (2nd edn, Albabi Alhalbi Press 1966) 105,161, 372; I. Alsherazi , *Altabahirah* (Dar Alfiker 1983) 535 ; For more see A. Althwehai, *Ga'adt An Alalsal Fe Alshia'a Alibaha* (Imam Muhammad Bin Saud University Press 2007) 28.

³⁸⁴ The *Maliki* school is the widest school in application of this matter; however, the *Hanbali* school (applied in Saudi Arabia) was the last school to accept new contracts; See S. Mankabady, 'Insurance under Islamic Law: The Islamic Insurance Company' (1989) 4 ALQ 199, 204.

³⁸⁵ M. Alzarga, *Nizam Alta'amin Haqiqth Wa Alrai Alsharai Feh* (1st edn, Alrisalh Press 1983) 33–37.

2.4.2 The Doctrine Of Free Interest

Free interest means any interest which *Sharia'a* law did not consider with a certain proof from the *Quran*, *Sunnah* or analogy, and which brings up benefits or prevents damages.³⁸⁶ The *Maliki* school of law is famous for its view of the admissibility of free interest, in disagreement with other Islamic schools.³⁸⁷ *Malikis* set out certain conditions for the interest to be admissible. These conditions include that the interest sought must be suitable for *Sharia'a* law goals, used to sustain necessary things (fortune, religion, honour, a person's life), general not partial, and must be comprehensible.³⁸⁸ By applying these conditions to insurance, it is obvious that insurance consists of a general interest to people, since it is a method of saving and forming useful capitals in production and manufacturing.³⁸⁹ It also gives peace of mind to traders and manufacturers and people in general, since it removes the financial burden they bear if the insured risk occurs and therefore sustains the person's fortune.³⁹⁰ Hence, the interest in insurance is suitable to *Sharia'a* goals and it is a general interest, which makes it admissible according to the doctrine of free interest.³⁹¹

³⁸⁶ A. Alaamdi, *Alehkam Fe Asool Alahkam* (Mohammad Ali Subaih Library and Press 1968) 203; See also A. Saleh, 'Almaslaha Almursalh Wa Tatbegatha Almoa'aserah' (2000) 16 (1) University of Damascus Journal 353, 355.

³⁸⁷ Those include *Shafais*, *Hanbalis* and *Hanafis*; Ibid

³⁸⁸ M. Algazali, *Almustasfa Fe Elm Alasool* (Dar Alkutb Alalmia 1983) 129; I. Alshatbi, *Ale'atsaam* (Dar Ibn Affan 1992) 607 and onwards.

³⁸⁹ A. Alsaiah (The Seventh Conference of Islamic Researches, Cairo, September 1972).

³⁹⁰ Ibid.

³⁹¹ Ibid.

2.5 CONCLUSION

To conclude, it can be said that there is nothing in Islam that forbids insurance, whether cooperative or commercial. The allegations of prohibitions are flawed and reflect a narrow view of the operation of insurance as a system. Moreover, some of the allegations (as in *riba*) are not related directly to the insurance contract per se and are not fundamental elements of insurance, even though they can be spotted in the ancillary commercial activities of the insurance company, just as any other commercial company.³⁹² This situation can be altered by the regulatory bodies making the company apply Islamic principles in its transactions, not by prohibiting the insurance contract. *Gharar* in the contract is light compared to *gharar* in other licit contracts under *Sharia'a* law, and when considering insurance as a system, not a sole contract between the insurer and the assured.³⁹³ Also, *gharar* needs to be tolerated for the public need and necessity.³⁹⁴ The insurance contract is not a gambling contract, as they are totally different in their meanings and objectives, and it is neither a *riba* nor gambling when considering insurance as a unilateral contract.

Cooperative and commercial insurance are both similar in their principles. The author argued that they are both consideration contracts with cooperative objectives.³⁹⁵ The only difference is noticed in the technical method and in the profit element.³⁹⁶ Since Islam does not forbid profits to attract more companies to insurance as an economic activity, and since the technical organisation depends on donation, or the *tabarru* principle, which the author refuted, the thesis

³⁹² See above under 2.2.2.

³⁹³ See above under 2.2.1.

³⁹⁴ Ibid.

³⁹⁵ See above under 2.3.

³⁹⁶ Ibid.

concluded that there is no real difference between commercial and cooperative insurance methods, as they are both admissible as ways of conducting insurance in Islam.³⁹⁷ The other ancillary illicit activities e.g. *riba* in investments must be judged on their own merits.³⁹⁸ Moreover, Islam does allow creating new contracts if they fulfil the needs and interests of the society, since the original state of things is admissibility.³⁹⁹ Additionally, the interest in insurance is needed by members of society, even though it is not considered with certain proof from the *Quran* or *Sunnah*, and therefore it can be admissible under the doctrine of free interest.⁴⁰⁰ Having argued this, the author thinks it is not legally efficient that contradicting legal views regarding insurance operate in the country. Accordingly, the view allowing only cooperative insurance based on the principle of donation or *tabruu* must be respected, if it is adopted by the supreme *Sharia'a* body in the country like *Haiat Kibar Alulma* in Saudi Arabia. Thus, all laws and regulations including the structure and technical organisation of the company must adhere to it.⁴⁰¹

After dwelling on insurance from an Islamic perspective, in the next chapter an overview of insurance in Saudi Arabia will be examined to comprehend the reflection of the environment where insurance regulations and laws have emerged in the current insurance legal regime. This environment, together with the *Sharia'a* law reservations regarding insurance, is believed to shape the approach of the insurance laws and regulations in Saudi Arabia. Issues including insurance history, laws, regulations and enforcement in Saudi Arabia will be discussed.

³⁹⁷ Ibid.

³⁹⁸ Ibid.

³⁹⁹ See above under 2.4.1.

⁴⁰⁰ See above under 2.4.2.

⁴⁰¹ For more discussion see Ch 3 'Insurance in Saudi Arabia'.

CHAPTER 3

INSURANCE IN SAUDI ARABIA

3.1 INTRODUCTION

It is often thought that insurance in Saudi Arabia emerged as a new economic activity after the economic boom of the 1970s, and the beginning of the financial growth and development.⁴⁰² However, careful observation of the insurance history in Saudi Arabia reveals that insurance was in fact practised long before that era.⁴⁰³ The first occurrence of insurance in Saudi was more than 60 years ago, in the city of Jeddah on the western province of Saudi Arabia. Insurance at that time was used to fulfil the need for suitable cover for government contractors and for exporting goods.⁴⁰⁴ The operation was practised by brokers and insurance agencies, without being registered in Saudi Arabia, and by designated terms far from the term ‘insurance’.⁴⁰⁵ Insurance began to grow more in the 1960s, and by the middle of the 1970s the growth was substantial.⁴⁰⁶ The increase in oil prices doubled the governmental spending, and consequently the number of companies which delivered various infrastructure services such as buildings, airports, motorways, and energy and gas projects also increased.⁴⁰⁷ Insurance in this flourishing era of practice operated away from governmental control or regulations. The hesitance in the governmental recognition of such practice, and in the promulgation of regulating laws was due to the *Sharia*’a law reservations

⁴⁰² S. Salem, ‘Insurance Position in the Kingdom’ (a paper presented to the General Manager of Riyadh Chamber of Commerce, Riyadh, 1993) 4–5 ; A. Haberbeck, ‘Insurance Under Saudi Arabian Laws’ [1986] LMCLQ 246, 247.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid.

pertaining to commercial insurance.⁴⁰⁸ It was obvious that the unique legal system in Saudi Arabia, based on *Sharia'a* law as the primary and supreme law of land,⁴⁰⁹ caused tension between legal theory and practice. In legal theory, commercial or conventional insurance was forbidden by '*Haiat Kibar Alulma*' in its '*fatwa*' in 1977,⁴¹⁰ which permitted only cooperative insurance, since it is based on donation and not profit seeking.⁴¹¹ However, in practice the government had to accept insurance as a necessary tool in modern economies, to comply with its urgent needs for development. In 1985, the government reacted to correct the situation by announcing the establishment of a state-owned cooperative insurance company, named as the 'National Company for Cooperative Insurance' (NCCI) with capital of 500 million Saudi Riyals (SR) (approximately 143 million US\$), to fill the needs of the government as well as the private sector concerning insurance.⁴¹² It was the only insurance company officially recognised, while more than 75 companies still practised commercial insurance in the country

⁴⁰⁸ See Ch 2 for more discussion on these reservations.

⁴⁰⁹ F. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Studies in Islamic Law and Society, Brill Academic Publishers 2000) 2; A. Doi, *Shariah: The Islamic law* (2nd edn, Ta Ha Publishers 2008) 13.

⁴¹⁰ *Haiat Kibar Alulma* is a supreme body of *Sharia'a* jurists in Saudi Arabia. *Fatwa* is the opinion of this body which is highly considered by the Saudi Arabian judiciary; See decision No 55, 10th session in 25/3/1977. The prohibition of conventional insurance and the admissibility of cooperative insurance was also affirmed by the International Islamic Fiqh Academy, decision No 9 (2/9), Jeddah, 22-28 Dec 1985, published in 2 (2) *Majalt Almajma'a* 545 and its opinion is highly respected in Saudi Arabia; See A. Haberbeck, 'Insurance Under Saudi Arabian Laws' [1986] LMCLQ 246, 247.

⁴¹¹ The author argued in Ch 2 that both are admissible methods of insurance provided certain conditions are satisfied which prevents the ancillary illicit practices such as *riba* in investing the insurance funds. However, in this chapter, discussion will be based on the *fatwa* and the view which allows only cooperative insurance, and prohibits commercial insurance, which is applied in Saudi Arabia.

⁴¹² By Royal Decree M/5 dated 10/1/1985; incorporated on Jan 18, 1986, Com Reg No 1010061695.

without any registration.⁴¹³ Despite the recognition of cooperative insurance at the beginning of the 1980s as the only form of insurance admissible in the country, it was not until 2003 that the government promulgated the first comprehensive law regulating the insurance business, namely: ‘Law On Supervision of Cooperative Insurance Companies’ (LSCIC2003),⁴¹⁴ along with its implementing regulations published in 2004.⁴¹⁵ The law was articulated with the intent of placing all the insurance practices under the umbrella of *Sharia’a* law. That is clear from article 1 of the law which states that,

“Insurance in the Kingdom shall be undertaken through registered insurance companies operating in a cooperative manner.... and in accordance to Sharia’a principles.”

Thus, commercial insurance which used to be practised in the Kingdom is diminished, as companies looking to practise insurance in Saudi Arabia after the law must conclude it in a cooperative method and according to *Sharia’a* principles as in the LSCIC2003.

This chapter will contribute towards providing a background to the regulatory and legal environment surrounding insurance in Saudi Arabia. This is necessary in order to comprehend the effect of such an environment on the approach of insurance laws and regulations in Saudi Arabia in general, and on the duty of good faith specifically, and also to understand the priority of interests which need protection by Saudi legislators and regulators, which in turn

⁴¹³ S. Salem, ‘Insurance Position in the Kingdom’ (a paper presented to the General Manager of Riyadh Chamber of Commerce, Riyadh, 1993) 4-5.

⁴¹⁴ By the Royal Decree M/32 dated 1/8/2003; See <http://www.sama.gov.sa/sites/SAMAEN/Insurance/InssuranceLib/4600_C_InsuraLaw_En_2005_08_17_V1.pdf> accessed 28 August 2009.

⁴¹⁵ The LSCIC2003 Implementing Regulations are promulgated by the decision by the Minister of Finance No 569/1 dated 21/4/2004; See <http://www.sama.gov.sa/sites/SAMAEN/Insurance/InssuranceLib/4600_C_ReguExecutive_En_2005_08_18_V1.pdf> accessed 28 August 2009.

forms the legal approach to the duty of good faith in Saudi insurance laws which are the focal laws in this comparison. The chapter will firstly provide a background of the general business law and court system in Saudi Arabia to comprehend the legal environment which insurance has to operate within. Secondly, it will look at the legal situation of the Saudi insurance market before and after the promulgation of LSCIC2003, analysing to what extent the law has decreased the gap between legal theory and practice. Thirdly, it will explain how insurance contracts are enforced in Saudi Arabia, highlighting the competent authorities to hear insurance disputes, before and after LSCIC2003.

3.2 BUSINESS LAW AND COURT SYSTEM

Saudi Arabia did not enact a contemporary civil code. Instead, *Sharia'a* law is supposed to play that role, according to the teaching of the *Hanbali* school of Islamic law.⁴¹⁶ *Sharia'a* courts in Saudi Arabia rely primarily on *fatwa* when entertaining secular transactions, together with three *Hanbali* treatises.⁴¹⁷ If still no answer is found, the judge has the freedom to consult other *Hanbali* books or other *Sunni* Islamic schools of law interpretations.⁴¹⁸ However, there are cases where the direct *Sharia'a* purview was removed and transferred to state-made regulations, although not completely out of the ambit of *Sharia'a* scrutiny. Commercial law is the body of law which mostly contains these cases.⁴¹⁹ Saudi Arabia has adopted a distinction between commercial and civil law, as adopted in France and other civil law countries.⁴²⁰ The distinction is transferred to Saudi Arabia from the *Othmani* empire,⁴²¹ which controlled *Hijaz* (the western province of Saudi Arabia) in the beginnings of the 20th century, and from the Egyptian draftsmen, both influenced by French law.⁴²² That distinction

⁴¹⁶ See Ch 2; N. Saleh, 'The Law Governing Contracts in Arabia' (1998) Int'l and Comp LQ 761, 764.

⁴¹⁷ N. Saleh, 'The Law Governing Contracts in Arabia' (1998) Int'l and Comp LQ 761, 764.

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ Ibid; The Empire lasted from 1299–1923, and is succeeded now by Turkey.

⁴²² Ibid.

was welcomed since it allows contemporary codes without distorting *Sharia'a* teaching by modification and adaption.⁴²³

The Commercial Court Law 1931 (CCL1931)⁴²⁴ is considered the major and oldest commercial law in Saudi Arabia, and was derived from the Commercial and Maritime regulations of the *Othmani* empire.⁴²⁵ Since it regulates particularities of specific categories of people, i.e. 'merchants', commercial law was viewed as a subsidiary of the general law, i.e. *Sharia'a*.⁴²⁶ Hence, *Sharia'a* rules and commercial custom practice were the default rules when there was a legal vacuum within the provisions of commercial laws, and only sought as a last remedy.⁴²⁷ Other commercial laws were also promulgated to be added to the overall commercial legislation, for example, the Negotiable Instruments Law 1964,⁴²⁸ Commercial Companies Law 1965⁴²⁹, and the Banking Control Law 1966.⁴³⁰ The enforcement of commercial laws was not entertained by *Sharia'a* courts.⁴³¹ Instead it was resorted to other

⁴²³ Ibid.

⁴²⁴ Issued by Royal Decree M/32 dated 1/6/1931.

⁴²⁵ N. Saleh, 'The Law Governing Contracts in Arabia' (1998) 38 Int'l and Comp LQ 761, 764.

⁴²⁶ M. Al Jaber, *Alqanun Altijari Alsaudi* (University Editions of Riyadh 1982) 7.

⁴²⁷ Ibid.

⁴²⁸ By Royal Decree M/37 dated 24/2/1964.

⁴²⁹ By Royal Decree M/6 dated 21/7/1965.

⁴³⁰ By Royal Decree M/5 dated 11/6/1966.

⁴³¹ N. Saleh, 'The Law Governing Contracts in Arabia' (1998) 38 Int'l and Comp LQ 761, 764.

bodies, even though *Sharia'a* still had general jurisdiction.⁴³² The Commercial Court was the court which originally entertained commercial and marine insurance cases,⁴³³ but its authority was transferred to the 'Commercial Disputes Settlement Committee' in the Ministry of Commerce.⁴³⁴ After that, the jurisdiction was transferred to the Board of Grievance '*Diwan Almathalem*' which was given the authority to entertain both commercial and administrative cases by an edict by the Council of Ministers, until creating the new commercial courts.⁴³⁵ Moreover, committees of semi judicial nature were formed to have purview among certain categories of cases relating to certain commercial laws, such as the 'Banking Dispute Settlement Committee' which resolves disputes pertaining to the Banking Control Law 1966,⁴³⁶ and the 'Insurance Violations and Disputes Resolution Committee' (IVDRC) which resolves disputes and violations pertaining to the LSCIC2003.⁴³⁷ It is worth mentioning that the number of those committees has increased, to more than 70 committees relating to 27

⁴³² Ibid.

⁴³³ See CCL1931 issued by Royal Decree M/32 dated 1/6/1931.

⁴³⁴ See Council of Ministers Decision No 186 on 8/8/1967.

⁴³⁵ See Council of Ministers Decision No 241 on 23/6/1987 which provides the transfer of the prerogatives of the 'Commercial Disputes Settlement Committee' to '*Diwan Almathalem*'; See also Council of Ministers Decision No 231 dated 26/10/1987, and No 261 dated 20/1/2003, which provides that the Board has jurisdiction over subordinate commercial matters as well.

⁴³⁶ Issued by Royal Decree M/5 dated 11/6/1966.

⁴³⁷ Art 20 LSCIC2003; see below for more discussion.

different governmental bodies.⁴³⁸ With almost every different commercial law promulgated, a semi judicial committee was formed to hear disputes relating to it.⁴³⁹

Despite everything, *Sharia'a* inspection was not completely absent in commercial cases.⁴⁴⁰ For instance, '*Diwan Almathalem*' decisions have to be approved by a commercial board which assures that the decision accords with *Sharia'a* law, secular laws and principles of justice.⁴⁴¹ Also, it must be kept in mind that in Saudi Arabia, *Sharia'a* ambience overcomes all sectors of life.⁴⁴² There may be some flexibility in some laws articulated by the state, but if there was a conflict in court between a *Sharia'a* principle and a secular law, *Sharia'a* prevails, especially when it derives directly from prominent origins such as the *Quran* and *Sunnah*.⁴⁴³ Even if a *Sharia'a* principle was derived from analogy (*qiyas*) or consensus of jurists (*ijma'a*), which are other, less certain, sources of *Sharia'a* law, *Sharia'a* seem to be

⁴³⁸ Y. Alhudaithi, 'Aljihat Shbh Alqadaiah' (Centre of Judicial Studies Specialist, 25 Feb 2009) found in <<http://www.cojss.com/showcat.php?c=17>> accessed 10 June 2012.

⁴³⁹ Ibid.

⁴⁴⁰ N. Saleh, 'The Law Governing Contracts in Arabia' (1998) 38 Int'l and Comp LQ 761, 764.

⁴⁴¹ Art 1 of The Law Of Procedure Before the Board Of Grievance (issued by Royal Decree M/3 in 26/11/2013), provides that the Board will apply *Sharia'a* law and any other secular laws which do not contradict *Sharia'a* law; N. Saleh, 'The Law Governing Contracts in Arabia' (1998) 38 Int'l and Comp LQ 761, 764; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Law Series, Kluwer Law International 1996) 156–157.

⁴⁴² See above.

⁴⁴³ N. Saleh, 'The Law Governing Contracts in Arabia' (1998) 38 Int'l and Comp LQ 761, 764; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Law Series, Kluwer Law International 1996) 156–157.

dominant over other man-made laws.⁴⁴⁴ Accordingly, a dispute will be legally accepted and subject to enforcement in Saudi Arabia only if it passes the assessment of both *Sharia'a* and secular laws.⁴⁴⁵

In any case, the jurisdiction of commercial cases is subject to change after the promulgation of the new Judiciary law (JL2007).⁴⁴⁶ Under the JL2007, the jurisdiction of commercial cases is passed to a commercial court in the first instance, instead of the Board of Grievance or the committees of a semi judicial nature as was the situation previously.⁴⁴⁷ Hence, the JL2007 unifies the jurisdiction again to be in one court i.e. the commercial court. However, the Executive Work Plan for Judiciary Law 2007 made exceptions to some committees of a semi judicial nature, to operate away from the JL2007, i.e. without assimilation within the main judicial system.⁴⁴⁸ Those committees include the Banking Dispute Settlement Committee and the IVDRC.⁴⁴⁹

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ Promulgated by Royal Decree M/78 dated 1/10/2007; The law is not yet enforced in practice, and the legal situation is still in the course of transformation. The 'Executive Work Plan for Judiciary Law and Board of Grievance Law 2007' which was promulgated with the law provides details on how the changes in the law will be executed in practice, and the timeframe for such changes.

⁴⁴⁷ Art 9 JL2007; Part 1, section 9 of the Executive Work Plan for Judiciary Law and Board of Grievance Law 2007; See above.

⁴⁴⁸ See Part 3, section 2 of the Executive Work Plan for Judiciary Law and Board of Grievance Law 2007. The insurance committee and other committees, e.g. banking, were exempted from being under the main judicial system at the main time. The Work Plan provides that the Higher Judicial Council, which is the supervisory body over the judicial system in Saudi Arabia, will study their situation after it starts its duties and must provide

Furthermore, the JL2007 provides that the judgment of the commercial case can be appealed in front of the commercial departments of the Appeal Courts.⁴⁵⁰ According to the JL2007, Appeal Courts with commercial, criminal, labour, martial and general rights departments are to be created as second degree litigation courts, with the authority to review the subject of the appealed case heard at first instance.⁴⁵¹ In addition, the judgment of the commercial case given by the Court of Appeal can be challenged by the Supreme Court, which can review the case with regard to the law application, without reviewing the subject of the case.⁴⁵² The law in this respect means *Sharia'a* law, and secular laws promulgated by the government as long as they do not contradict *Sharia'a* law.⁴⁵³

a decision regarding them within a year. However, the Higher Judicial Council did not start its duties under the new Judiciary law as the transformational period has not been completed.

⁴⁴⁹ Ibid.

⁴⁵⁰ Art 15- Art 17 JL2007.

⁴⁵¹ Ibid .

⁴⁵² Art 10 JL2007.

⁴⁵³ Art 11 JL2007.

3.3 THE OPERATION OF THE INSURANCE MARKET

3.3.1 Before The LSCIC2003

I Insurance Laws In Saudi Arabia

It is maybe thought that, since insurance was not recognised by the government before the LSCIC2003, no laws or regulations whatsoever relating to insurance can be found in Saudi legislation. However, that is not entirely true. The first occurrence of insurance in Saudi legislation can be observed in the CCL1931, articles from 324–389.⁴⁵⁴ The law was concerned with marine insurance in particular, and contained three sections, regulating the insurance contract, duties of the parties, and the assured objects. Under the CCL1931, article 433(c), the Commercial Court was to be responsible for hearing any dispute pertaining to marine insurance. Since the law was influenced by French law back in 1807, it was archaic, and an urgent reform was called for to adapt to the new changes in the industry.⁴⁵⁵ Hence, the CCL1931 only governed marine insurance contracts theoretically, but it was not applied in practice, leaving the market in a chaotic status. As time passed, other insurance related laws and regulations were announced cautiously to fulfil a high necessity in society, for instance the ‘Social Insurance Law 1969’ which was of particular importance to employees and employers in the kingdom.⁴⁵⁶ Moreover, the government, in some of its decisions and regulations, made insurance an obligation which must be complied with. For example, the

⁴⁵⁴ See above under 3.2 for more about the CCL1931 in general.

⁴⁵⁵ A. Haberbeck & M.Galloway, *Saudi Shipping Law* (Fairplay Publications 1990) 12; A. Haberbeck, ‘Insurance Under Saudi Arabian Laws’ [1986] LMCLQ 246.

⁴⁵⁶ Issued by Royal Decree M/22 dated 15/11/1969; Art 4 of the law declares that all workers without distinction on the basis of nationality or sex who work for one employer or more are governed by this law.

Council of Ministers decision in 2001 forced insurance on all driving licences in Saudi Arabia (third party civil liability insurance) and on all cars passing Saudi lands.⁴⁵⁷ Another form of obligatory insurance was introduced in ‘Cooperative Health Insurance Law 1999’.⁴⁵⁸ Its main concern was organising health insurance for all foreigners residing in the Kingdom and their families, and Saudi nationals working in the private sector and their families, with a possible application on Saudi nationals by a Council of Ministers decision.⁴⁵⁹

II Governmental Supervision On The Insurance Business

Since every insurance company has limited resources, which can be determined by its capital, reserves and previous work experience, it has been always a fundamental principle for them to use different techniques, such as the law of large numbers, in their management of insurance operations and determining the gross premiums.⁴⁶⁰ Also, it is normal to carry out

⁴⁵⁷ Council of Ministers Decision No 222 on 31/10/2001: the decision was amended by the Council of Ministers Decision No 217 on 25/1/2007 to force insurance on vehicles, not on licences.

⁴⁵⁸ On 10/8/1999; the modified implementing regulations of the law were approved in Session No 73 dated 3/5/2009 and adopted pursuant to Ministerial Decision No DH/1/30/6131 dated 2/6/2009

⁴⁵⁹ Art 1 Cooperative Health Insurance Law 1999. The law also applies to all Saudi nationals who work in the private sector and their families; See Art 3 Cooperative Health Insurance Law 1999 Implementing Regulations. The author will not elaborate on this law since it mainly concerns group insurance. The insurance policy is between the employer for the benefit of his employees on one hand and the insurer (cooperative insurance companies allowed in the Kingdom and authorised to offer health insurance); See Art 70 & Art 1 Cooperative Health Insurance Law 1999 Implementing Regulations.

⁴⁶⁰ See E. Vaughan & T. Vaughan, *Essentials of insurance: a Risk Management Perspective* (2nd edn, Wiley 2002) 17; J. Teale, *Insurance and Risk Management* (CCH Australia Limited 2013) 11.

international reinsurance operations, to decrease and distribute the risks involved.⁴⁶¹ These factors were enough to draw the attention of governments to control the operation of insurance companies on their application of these techniques, and on their ability to provide sufficient deposits and financial reserves to fulfil their obligations.⁴⁶² This governmental supervision normally comprises obligations on insurance companies to present their yearly balance sheets, profit and loss calculations, expenditure and revenue information showing reserves for outstanding obligations and indemnities under settlement, information on obligatory funds held in local banks, and any other information sought by the supervisory bodies.⁴⁶³ Additionally, the governmental bodies have the right to review complaints against insurance companies, examine insurance companies with financial difficulties, organise insurance brokers, and exercise the authority of judicial police.⁴⁶⁴

Given this importance of governmental control on insurance companies, there is a question as to whether any of it existed in Saudi Arabia before the promulgation of the LSCIC2003. As previously mentioned, insurance was operating in Saudi Arabia with hesitance and suspicion. This could be partially because of the social solidarity and strong family relationships in Saudi Arabia, where a person, after god, seeks help from his family or tribe when an accident occurs.⁴⁶⁵ However, it is mostly influenced by the religious aspect, and by the *fatwa* from

⁴⁶¹ Ibid.

⁴⁶² N. Feetham, *A Guide to Insurance: Combining Governance, Compliance and Regulation* (Spiramus Press Ltd 2012) 4-8; K. Meier, *The Political Economy of Regulation: The Case of Insurance* (SUNY Press 1998) 33.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid; S. Salem, 'Alragabh Almatlobh Ala Sina'at Altamin' *Iqtisadiyah newspaper* (Saudi Arabia, 16 Feb 1993) 5.

⁴⁶⁵ J. Kostiner, 'Transforming Dualities: Tribe and State in Saudi Arabia', in P. Khoury & J. Kostiner (eds) *Tribes and State Formation in the Middle East* (University of California Press 1990) 226.

‘*Haiat Kibar Alulma*’ in particular, which prohibits commercial insurance.⁴⁶⁶ Even so, the insurance market in Saudi Arabia is still considered the biggest amongst the GCC Countries.⁴⁶⁷ The increase in the insurance market before the LSCIC2003 reached 5.7 %, with gross premiums of 2.5 billion Saudi Riyals (SR), and an estimated market size of 10 billion SR.⁴⁶⁸ Thus, the size of the market was considerable, which highlighted the need for efficient regulations and supervision that were clearly absent. Insurance – except that which was concluded by NCCI, which is trading now by the name of ‘*Tauwniya*’ – was practised through branches of insurance companies registered abroad, and operating through agents and brokers in the country.⁴⁶⁹ Those agents or brokers may be individuals, establishments, or limited liability companies dealing with commercial agencies from foreign companies, with insurance being a type of their different agencies.⁴⁷⁰ Given the circumstances, those agents or brokers may have no knowledge of or relation to the insurance industry, and have no specific standards of liability of the insurance operations which they carry. Instead, their liability is to be determined following the type of company they work for, under the Company Law 1965

⁴⁶⁶ See above under 3.1.

⁴⁶⁷ See below.

⁴⁶⁸ Study done by NCCI, *Okaz newspaper* (Saudi Arabia, 15 April 1998) No 11558.

⁴⁶⁹ S. Salem, ‘Insurance Position in the Kingdom’ (a paper presented to the General Manager of Riyadh Chamber of Commerce, Riyadh, 1993) 4–5; A. Haberbeck, ‘Insurance Under Saudi Arabian Laws’ [1986] LMCLQ 246; A. Marar, ‘Saudi Arabia: The Duality in the Legal System and the Challenge of Adapting Law to Market Economies’ (2004) 19 ALQ 91,107,120; The Economist Intelligence Unit, *Country Finance: Saudi Arabia* (The Economist Intelligence Unit Limited, Jan 2004) 14 .

⁴⁷⁰ Ibid.

and the Commercial Agency Law 1962 and its implementing regulations.⁴⁷¹ Those laws, however, do not provide insurance as an important economic and financial activity with any special rules, which means that insurance was treated like any other commercial activity practised by those brokers and agents. There were no specific provisions or rules regarding insurance premiums' prices, funds kept by the company, funds that require reinsurance, reinsurance methods, or the ability of reinsurance companies to handle their obligations. Moreover, there were no organised obligations for these companies to provide sufficient reserves, publish their balance sheet, invest premiums or profits within the country, or even keep specified funds in the local banks or provide immovable possessions as a general guarantee.⁴⁷² This legal vacuum before the LSCIC2003 resulted in a disordered insurance market which jeopardised the rights of policy holders and the Saudi economy. Also, it created what is called a 'duality' in the legal system, and a gap between legal theory and practice. This will be explained below.

⁴⁷¹ Ibid; Royal Decree M/11 dated 23/7/1962, amended by Royal Decree M/8 dated 23/4/1976 and by Royal Decree M/32 dated 24/6/1980; Implementing Regulations by Minister Council Decision No 1897 dated 12/12/1990.

⁴⁷² For more, see N. Feetham, *A Guide to Insurance: Combining Governance, Compliance and Regulation* (Spiramus Press Ltd 2012) 4-8; K. Meier, *The Political Economy of Regulation: The Case of Insurance* (SUNY Press 1998) 33.

III Effects Of The Legal Vacuum Before The LSCIC2003

1. On Policy Holders

For policy holders, the practical reality demonstrated clearly that insurance companies before the LSCIC2003 were always hesitant to pay indemnities which they are liable for, and disputed with assureds to circumvent their obligations.⁴⁷³ As a result, many assureds resorted to arbitration and bore unnecessary financial burdens to obtain their rights, and then only after a considerable time.⁴⁷⁴ In addition, since reinsurance operations were not regulated, insurance companies concluded reinsurance with companies which did not have the ability to fulfil their obligations.⁴⁷⁵ Also, the absence of special rules for insurance agents released them from many liabilities for the obligations of the insurance company that they represent.⁴⁷⁶ All these factors led those foreign insurance companies to severe financial difficulties, and into bankruptcy, endangering the rights of the assureds back in Saudi Arabia.⁴⁷⁷ It must be borne in mind that the dissolution of those companies will be under the law of the country of registration. Thus, foreign courts will be responsible for distributing the company's assets, including the insurance policies.⁴⁷⁸ Accordingly, assureds will need claim their rights in the

⁴⁷³ Aliqitsad wa Aamal, Interview with M. Alrubi'an, General Director, NCCI (Riyadh, March 1988).

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

country where the company was registered and from foreign courts, mostly situated in Bermuda, the Cayman Islands, Hong Kong, and Cyprus.⁴⁷⁹

2. On The Economy

For the Saudi economy, the gaps in regulating the investments carried by the insurance companies resulted in wasting huge investment opportunities.⁴⁸⁰ The major share of surplus made by insurance companies was directed to investments in stock markets and securities outside Saudi Arabia.⁴⁸¹ A documented study has revealed that the estimated yearly flow of insurance revenues outside the Kingdom was around 3.5 billion SR.⁴⁸² This escape of investments in the absence of governmental regulations could be justified partially by the religious reservations on insurance, which encourage companies to downsize any investment in Saudi Arabia. However, it was mostly because of the small size of the financial papers market, and the lack of suitable investment channels such as securities and governmental bonds.⁴⁸³ If a regulation were passed obliging those insurance companies to invest part of their surpluses in Saudi Arabia, the national economy would benefit from billions of Riyals transferred abroad.

⁴⁷⁹ Ibid.

⁴⁸⁰ See below.

⁴⁸¹ Editorial, *Alam Aliqtisad Magazine* (Saudi Arabia, 16 May 1992) 62.

⁴⁸² Ibid.

⁴⁸³ Ibid.

3. On The Legal Status

From a legal aspect, a duality in the legal system pertaining to insurance before the LSCIC2003 was obvious.⁴⁸⁴ As a country under ongoing development, Saudi Arabia was shifting to adopt a market-oriented economy model, and encouraging foreign investments and the private sector to enrol in the developmental process.⁴⁸⁵ However, this shift, together with social necessity, forced the government to adopt economic policies which respond to such needs, even contradicting the interpretation of the majority of religious authorities in the country.⁴⁸⁶ Since it was unquestionable to distort or replace *Sharia'a* law as the supreme system in Saudi Arabia, a duality was created to accommodate such needs, or what is called a 'system within a system'.⁴⁸⁷ There were two contradicting legal systems in operation, namely the conventional system of commercial insurance which was trying to operate within the Islamic system which prohibits it. Such legal duality leads to the inefficiency of the economic or financial system in question, and decreases predictability.⁴⁸⁸ The legal system will be uncertain and far from comprehensible, driving away any potential investments to more mature and clear legal environments.⁴⁸⁹ For these reasons, Saudi Arabia tried to correct this

⁴⁸⁴ For more about the subject see for example, J. Griffiths, 'What is Legal Pluralism?' (1986) 18 (24) The journal of Legal Pluralism and Unofficial Law 1, 2; S. Merry, 'Legal Pluralism' (1988) 22 Law and Society Review 869, 875.

⁴⁸⁵ A. Marar, 'Saudi Arabia: The Duality in the Legal System and the Challenge of Adapting Law to Market Economies' (2004) 19 ALQ 91, 107–122.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

legal duality as part of its shift to a market oriented economy, by establishing the NCCI in 1985, as a state owned cooperative insurance company.⁴⁹⁰ In its articles of association, the obedience of *Sharia'a* law was evident.⁴⁹¹ The NCCI had to conclude insurance in a cooperative manner, with certain principles applied according to such concept.⁴⁹² These principles included cooperation and solidarity between policy holders to distribute the risks, management of the insurance funds for the benefit of policy holders, the return of surpluses of insurance operations to policy holders after deducting the necessary expenses, and the investment of the rest of the insurance funds in Islamic admissible methods for the benefit of policy holders.⁴⁹³

In this author's view, it seems the NCCI did not solve the problem of the duality in the legal system for two main reasons:

1. The NCCI tried to fulfil the social need for insurance, especially for the governmental infrastructure projects, and for the private sector. However, it did not cover more than 30% of the Saudi market, which is equivalent to 750 million SR of premiums. Thus,

⁴⁹⁰ See above.

⁴⁹¹ NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013; It must be noted that this is the latest version of the articles including the amendments made on 2004 after the promulgation of the LSCIC2003.

⁴⁹² Art 3 NCCI Articles of Association, NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013

⁴⁹³ Aliqitsad wa Alamal, Interview with M. Alrubi'an, General Director, NCCI (Riyadh, March 1988) 55.

the market gap was still filled by foreign commercial insurance companies through agents and brokers.⁴⁹⁴

2. Even though the NCCI is tagged as a cooperative insurance company and consisted of some cooperative insurance principles.⁴⁹⁵ Nonetheless, its practice and structure was more like that of a commercial insurance company. The commercial characteristics of the NCCI can be noticed in various aspects. It was observed that :

Firstly, the legal company structure of the NCCI was not a structure of a cooperative company.⁴⁹⁶ Instead it was a joint stock company with capital and shareholders, with shares divided between three government bodies.⁴⁹⁷ There was no requirement that the shareholder must be an assured as well, which is a significant principle in mutual/cooperative insurance.⁴⁹⁸ If the NCCI was a genuine cooperative insurance company, it would have applied the framework of cooperative companies embedded in the Saudi Company Law 1965.⁴⁹⁹ The law presented a flexible scheme to those companies (unlike joint stock companies) regarding the increase and decrease in the capital.⁵⁰⁰ This flexibility allows smooth movement of shareholders in and out of the company, which can

⁴⁹⁴ S. Salem, 'Alragabh Almatlobh Ala Sina'at Altamin' *Iqtisadiyah Newspaper* (Saudi Arabia, 16 February 1993) 5.

⁴⁹⁵ See above.

⁴⁹⁶ A. Korshaid, *Islamic Insurance: A Modern Approach to Islamic Banking* (Routledge Curzon, 2004) 134–135

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid; Art 189-209 Saudi Company Law 1965.

be employed in insurance to allow a membership arrangement for the assureds.⁵⁰¹

Secondly, in cooperative companies, every shareholder is entitled to one vote in the company's meetings, no matter what number of shares he owns.⁵⁰² However, in the NCCI the shareholder must own 20 shares to be able to have one vote, and each further 20 shares entitle him to an extra vote.⁵⁰³

Thirdly, the clients of the cooperative company are usually the shareholders, and even if the company serves non-members, that does not affect its cooperative character if it started from the beginning as one, and applied cooperative rules.⁵⁰⁴ Hence, the NCCI cannot claim that it is not a genuine cooperative because it offers services to non-shareholders.⁵⁰⁵

The author believes that these observations may be valid, but does not agree with them fully. Firstly, requiring that the shareholder in the cooperative insurance company must be an assured as well is not entirely correct. It has been discussed that the large number of assureds and the complexity of operations led to transferring the management of the insurance operations to a fully dedicated company, rather than the assureds.⁵⁰⁶ The cooperative

⁵⁰¹ A. Korshaid, *Islamic Insurance: A Modern Approach to Islamic Banking* (Routledge Curzon, 2004) 134–135.

⁵⁰² Ibid; Art 203 Saudi Company Law 1965.

⁵⁰³ Ibid.

⁵⁰⁴ Ibid; Art 204 Saudi Company Law 1965.

⁵⁰⁵ Ibid.

⁵⁰⁶ Also to attract assureds to insure in this way, see Ch 2 under 2.2 for more.

insurance company will act on behalf of the assureds as a manager and/or investor to the insurance operations/funds.⁵⁰⁷ Probably what is meant is that the NCCI was in fact the insurer, not only the manager and /or investor for the insurance operations and/or funds, which violates cooperative insurance principles, where the risk must lie on the assureds not be transferred to the company as an insurer.⁵⁰⁸ Secondly, the suggestion about adopting the cooperative company structure embedded in the Saudi Company Law 1965 for insurance is not admirable. It must be remembered that insurance is unique in nature as a significant financial operation which has an impact on the economy. Also, cooperative insurance consists of unique principles which make its structure and organisation different from other cooperative companies.⁵⁰⁹ Hence, the structure of the cooperative insurance company to be adopted must bear in mind the technicalities and principles applied in cooperative insurance.⁵¹⁰ It is worth mentioning that the NCCI did not adopt the cooperative insurance company structures or technical organisations that are followed and recognised in other Islamic countries adhering to cooperative insurance, or as it is named in those countries, ‘*Takaful*’.⁵¹¹ In those countries, the cooperative insurance company is not the insurer, rather it is just the manager and/or investor to the insurance operations and/or funds, which may be based on a *wakalh*, *mudarabh* or a *wakalh /mudarabh* contract.⁵¹² Every assured is an insurer

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

⁵¹¹ For example: Malaysia, see Malaysian Takaful Act 1984; N. Mahmood, ‘Takaful: The Islamic System of Mutual Insurance: The Malaysian Experience’ 6(3) (1991) ALQ 280 .

⁵¹² Ibid.

at the same time, by participating in the scheme and donating his membership fee, with claims being paid from the insurance funds.⁵¹³ It would have made more sense if the NCCI adopted a cooperative insurance company structure similar to those aforementioned models, instead of adopting a structure similar to a commercial insurance company. Such a structure adds confusion and contradicts the cooperative insurance principles accepted by the *Sharia'a* authoritative board in Saudi Arabia, causing inefficiency and lack of clarity.

Despite everything, the cooperative character can be sensed in some aspects through the articles of association of the NCCI.⁵¹⁴ The duty of obedience to *Sharia'a* and the admissible investment of premiums according to *Sharia'a* law are believed to be where the cooperative notions were mostly perceptible.⁵¹⁵ Also, the cooperative principles can be noticed in placing separate accounts for the shareholders and the assureds' investments,⁵¹⁶ and in the distribution of surpluses to the assureds after deducting company and management expenses, which in any case must not be more than 10% of the net investments income.⁵¹⁷ The argument that can be raised, though, is that since the company does not call for additional premiums from the

⁵¹³ See Ch 2, under 2.2.

⁵¹⁴ See below.

⁵¹⁵ Art 3 NCCI Articles of Association. NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013.

⁵¹⁶ Art 43 NCCI Articles of Association. NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013.

⁵¹⁷ Art 8 NCCI Articles of Association (old version before 20 January 2004) ; it must be noted that the distribution of surplus changed after the promulgation of the LSCIC2003 and its implementing regulations on 20 January 2004 as the NCCI amended the Articles of Association.

assured when a deficit occurs, it will ensure a huge annual reserve. Hence, the potential of getting a decent profit for the assured will be very low.⁵¹⁸

3.3.2 After The LSCIC2003

Even though the *fatwa* which announced the admissibility of cooperative insurance, and the prohibition of commercial or conventional insurance was back in 1977, it was not until 2003 that the government actually promulgated a law which regulates the insurance business, along with its implementing regulations in 2004.⁵¹⁹ The law's main aims were to: fill the legal vacuum which existed regarding the supervision and control of the insurance companies, protect assureds and investors, develop the insurance sector, increase the stability of the market, and create an environment for competition resulting in better services and prices.⁵²⁰ Moreover, the law aimed to remove the legal duality by placing all insurance practices under one umbrella, i.e. *Sharia'a* law, through permitting cooperative insurance⁵²¹ as the only admissible form to operate in the Kingdom. Therefore, the law in its first article announced that:

⁵¹⁸ Ibid.

⁵¹⁹ See above under 3.1.

⁵²⁰ Art 2 LSCIC2003 Implementing Regulations.

⁵²¹ The term cooperative insurance, as mentioned in Ch1 can be misleading. What is meant here is the cooperative insurance which accords to Islamic principles, or else all conventional cooperative insurance companies will be Islamic, which is not the case of course.

*“Insurance in the Kingdom shall be undertaken through registered insurance companies operating in a cooperative manner as it is provided within the article establishment of the National Company for Cooperative Insurance promulgated by Royal Decree M/5 dated 17/5/1405 H, and in accordance with the principles of Islamic Sharia’a.”*⁵²²

Accordingly, insurance companies interested in operating in the Kingdom after the law had to be registered in Saudi Arabia, and not abroad. This is to keep those companies under the authority and control of local laws, as a kind of protection to policy holders. However, for these companies to be registered in Saudi Arabia, they must conclude insurance in a cooperative manner. The LSCIC2003 referred to the NCCI practice of the ‘cooperative manner’ embedded in its articles of association as a model for prospective insurance companies in applying the cooperative manner and principles.⁵²³ Hence, all commercial insurance companies which operated before in the Kingdom were no longer allowed. Those businesses must be transformed to cooperatives to be able to register in Saudi as valid insurance companies.

The LSCIC2003 announced the Saudi Arabian Monetary Agency (SAMA), which is the central bank in Saudi Arabia, as the body responsible for ensuring its application according to

⁵²² Art 1 LSCIC2003.

⁵²³ Art 1 LSCIC2003; NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013, it must be noted that on 20 Jan 2004, the NCCI changed its mission, strategy and vision. Also, the NCCI articles of association were amended after the announcement of the LSCIC2003 to conform to their requirements, and to support the company’s transformation from a closed joint stock to a public one by selling the government’s shares in the company through a public offering after the approval of Council of Ministers on 24/5/2004 ; see NCCI, *Prospectus: The Company for Cooperative Insurance* (NCCI 18 Dec 2004) found in <<http://ae.zawya.com/researchreports/zawyapr/SABB-NCCI-IPO-MainProspectus-En.pdf>> accessed in 28 October 2012.

the principles embedded in the implementing regulations.⁵²⁴ After the law, the establishment request of any insurance company must be examined by SAMA, which ensures its compliance with the necessary requirements.⁵²⁵ Moreover, the establishment of an insurance company must be licensed by a Royal Decree depending on a decision from the Council of Ministers, and must be reviewed by the Minister of Commerce and Industry.⁵²⁶

I The LSCIC2003: Filling The Legal Vacuum

In the author's view, it seems that the major theme of the LSCIC2003 was an insured-friendly theme – as it applied strict controls on the insurance business – which was a very logical result. It is obvious that the LSCIC2003 was attempting to correct the chaotic situation of the market and to restore confidence in it. One of its main concerns was to protect policy holders, who lost trust in the insurance market before the law promulgation, and were dragged through unnecessary struggles for their rights. The obligatory insurance announced by the government, for vehicles and for foreign residents' health, has stressed the need for such protection.⁵²⁷ It must be borne in mind that these types of obligatory insurance are concerned with individuals. Thus, the economic imbalance between the parties of the contract is evident, which underlines the need for security for these individuals, as weak parties. Moreover, if the insured were a corporate body, it would likely bear arbitration expenses as a solution for possible disputes and may even prefer it over going through the courts.

⁵²⁴ Art 2 LSCIC2003.

⁵²⁵ Ibid.

⁵²⁶ Art 3 LSCIC2003.

⁵²⁷ See above under 3.3.1.

An important aspect of the assureds' security is ensuring the financial capacity of the insurance company to carry out its business. According to LSCIC2003, the insurance company must be a joint-stock company, with a main goal of practicing insurance and/or reinsurance in the country.⁵²⁸ A minimum capital of 100 million SR for insurance companies, and 200 million SR for reinsurance companies, is required.⁵²⁹ If the company desired to increase the capital, that must be authorised by SAMA, and it must be in accordance with Company Law 1965.⁵³⁰

The other feature of policy holders' protection is noticed in the incurrance of liability on the management and the board of directors for any violation of the LSCIC2003.⁵³¹ Moreover, if a company desires to bring its insurance business to an end, that must be approved by SAMA.⁵³² This is to ensure that the insurance and/or reinsurance company does not suddenly stop its business, jeopardising the rights of the assureds, and to make necessary arrangements for protecting both investors and assureds. An efficient supervision of the insurance company activities was apparent throughout the articles of the LSCIC2003. For example, SAMA's approval is required for the appointment of the board of directors, opening of new branches, and the acquisition of any insurance or banking business or shares.⁵³³ Furthermore, SAMA has the right of inspection and the authority to require any data, records, accounts, statistics or

⁵²⁸ Art 3 LSCIC2003.

⁵²⁹ Ibid.

⁵³⁰ Ibid.

⁵³¹ Art 7 LSCIC2003.

⁵³² Art 5 LSCIC2003.

⁵³³ Art 9 LSCIC2003.

information relating to the insurance and/or reinsurance company.⁵³⁴ Another significant aspect of control can be observed in requiring the appointment of two independent legal accountants to be responsible for the assessment and revision of the financial balance sheets of the company before its publication.⁵³⁵ Another aspect is in requiring the allocation of at least 20% of the shareholders' income as a financial legal reserve for the company.⁵³⁶

The cooperative method embedded in the NCCI articles of association, and which is supposed to be followed by prospective insurance companies is not quite clear.⁵³⁷ From the outset it must be noted that the NCCI articles establish that the LSCIC2003 and companies' regulations shall apply for matters not included in the articles.⁵³⁸ In article 3, the NCCI establishes that the company's purpose is to carry out cooperative insurance operations and related activities e.g. investments, reinsurance, agency, lending, and liquidation of assets, all of which must conform to *Sharia'a*.⁵³⁹ The articles then set that the company will conduct insurance according to cooperative methods, and give the board of directors the liberty to control the insurance operations and distribution of surplus.⁵⁴⁰ The investment of insurance

⁵³⁴ Art 8, 11 LSCIC2003.

⁵³⁵ Art 10 LSCIC2003.

⁵³⁶ Art 70 LSCIC2003 Implementing Regulations.

⁵³⁷ That was required by Art 1 LSCIC2003.

⁵³⁸ Art 47 NCCI Articles of Association. NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013.

⁵³⁹ Art 3 NCCI Articles of Association, *ibid*.

⁵⁴⁰ Art 6 NCCI Articles of Association, *ibid*.

funds collected from the assureds and shareholders shall be carried out by the company according to the board of directors' rules.⁵⁴¹ The cooperative notion also can be sensed in article 43, where separate accounts are allocated for policy holders regarding the insurance operations⁵⁴², and for shareholders.⁵⁴³

II The LSCIC2003: A Solution To The Legal Dilemma?

Even though the LSCIC2003 has major advantages for the Saudi insurance sector, it was also subject to many criticisms, especially from the religious authorities.⁵⁴⁴ The LSCIC2003 in its

⁵⁴¹ Art 7 NCCI Articles of Association, *ibid*.

⁵⁴² That includes separate account for contributions from policy holders, and a separate account for compensations paid. The total surplus will be the difference between the two sum amounts after deduction of reserves and technical allocations.

⁵⁴³ The net surplus according to Art 43 NCCI Articles of Association, will be calculated as follows:

"The share of the Policyholders in the return on insurance operations funds shall be added to the total surplus mentioned in subsection (3) above after deducting the general expenses associated with the insurance operations in accordance with the rules set by the Board of Directors.

As determined by the Board of Directors, the net surplus mentioned in subsection (4) above shall be disposed on one or more of the following: a. Shareholders' proportion of surplus against exposure of their rights to insurance risks.

b. Surplus portion distributed back to Policyholders.

The excess shall be transferred to retained surplus account"; See NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013.

⁵⁴⁴ See below.

implementing regulations⁵⁴⁵ revealed many inconsistencies in demonstrating the cooperative notion of insurance, to the extent that it seemed to concern commercial and not cooperative insurance.

From a first glance, the LSCIC2003 did not define exactly what is meant by cooperative insurance, and what is to be considered out of its ambit. The last *fatwa* announced in Saudi Arabia defined cooperative insurance as one based on donations, aiming to help the needy, and not involving any returns to the members.⁵⁴⁶ Despite reservations on the defining *fatwa* which made insurance more of a charitable system and had major inconsistencies with other Islamic interpretations,⁵⁴⁷ what can be inferred is that the LSCIC2003 criteria, which involve returns distributed to members,⁵⁴⁸ conflict with the previous *fatwa*. A resolution to such contradiction is needed and a suitable definition is necessary to remove any misconceptions and to clarify the implications of the cooperative notion on the technical structure of the company and the principles adopted.

Furthermore, highlighting the cooperative notion and its implications between the assureds was absent in the definition section of the implementing regulations, and specifically when defining the insurance operation, the premium, the insurer, and the policy.⁵⁴⁹ The definitions made it clear that the cooperative insurance company is in fact the insurer and is liable for the

⁵⁴⁵ As the law draws only major outlines, the implementing regulations explain in detail how the law will be applied in practice.

⁵⁴⁶ *Fatwa* No 18322 dated 14/4/1996.

⁵⁴⁷ See Ch 2.

⁵⁴⁸ See above.

⁵⁴⁹ Art 1(7), 14, 17, 18 LSCIC2003 Implementing Regulations.

indemnity, not just a manager and/or investor of the insurance funds.⁵⁵⁰ The insurance contract in that way was more of a consideration than a donation contract,⁵⁵¹ which is not admitted by the *fatwa* in the country, and the assureds are not the insurers.⁵⁵²

Hence, a contradiction between the law, which announces that it adopts a cooperative notion, and the principles of the cooperative notion was evident. It was argued that for a company to be cooperative, it must act only as a manager or/and investor to the insurance operations/funds, not as an insurer, with the indemnity being paid by the assureds themselves from the insurance funds as participants in the scheme and donating their membership fee to the insurance fund as a form of cooperation.⁵⁵³

Other criticisms of the LSCIC2003 which concern contradictions with the cooperative notion included the distribution of surplus.⁵⁵⁴ The implementing regulations ruled that only 10% of the company's net surplus is to be distributed to the assureds directly or as a type of discount. However, the other 90% of the net surplus is returned to the shareholders.⁵⁵⁵ On the other hand, to be a genuine cooperative, the underwriting surplus must be for the sole benefit of the

⁵⁵⁰ Ibid.

⁵⁵¹ See Ch 2.

⁵⁵² See above under 3.1.

⁵⁵³ See A. Alatram comments on the LSCIC2003 Implementing Regulations, found in M. Ismeal, *Altamin Mn Almasaoleah Ala Hoadeth Alsearat Fe Almmlkh Alarbiah Alsaduiah* (Alfatah Press 2006) 168–171 ; Cooperative insurance companies in many Islamic countries adopt such practices e.g. Malaysia.

⁵⁵⁴ See below.

⁵⁵⁵ Art 70 LSCIC2003 Implementing Regulations; the net surplus is the total surplus minus the policy holders' investments' returns after deducting the necessary expenses.

assureds.⁵⁵⁶ It must be returned to them, or diverted to the following year to decrease the premiums. In the majority of the cooperative insurance models, underwriting the surplus is not considered a profit to be shared by the shareholders of the cooperative insurance company.⁵⁵⁷ It must be remembered that the cooperative insurance company has its own profits generated from investing the insurance funds and/or from the fees generated from managing the underwriting services.⁵⁵⁸ Also, in the author's view, the amount of the percentage returned back to the assureds does not reflect a genuine application of a cooperative insurance principle, i.e. the distribution of surplus, but rather a cosmetic adherence to it.⁵⁵⁹

Adding to the previous points, the author believes that the reference of the LSCIC2003 to the cooperative practice of the NCCI as a model for prospective insurance companies was unsuccessful. Firstly, as observed earlier, before the LSCIC2003 the practice of the NCCI was not genuinely cooperative, even it was tagged as one.⁵⁶⁰ If all the prospective insurance companies follow this inconsistent cooperative model, that would generate more inconsistent cooperative insurance companies. What the LSCIC2003 should have done is to lay out a crystal clear concept and principles for its 'cooperative manner', which accords with cooperative insurance principles and *Sharia'a* law applied in Saudi Arabia. That could have

⁵⁵⁶ See Ch 2 under 2.2.

⁵⁵⁷ Malaysia has allowed such sharing in profit but it is challenged in most countries; see Ch 2 'Insurance in Islam' for more discussion under 2.2.

⁵⁵⁸ See Ch 2 under 2.2.

⁵⁵⁹ It is worth noting that 20% of the shareholders' net income must be allocated as a reserve until it reaches 100% of the paid capital; see Art 70 LSCIC2003 Implementing Regulations.

⁵⁶⁰ See above under 3.3.1.

corrected the position of both the NCCI and prospective insurance companies. Secondly, as observed earlier, before the LSCIC2003 the NCCI did not solve the duality in the legal system, as a result of its inconsistency.⁵⁶¹ By placing it as a model to other companies, the legal duality will increase, resulting in more inefficiency in the financial system. Adding to that, the amended NCCI articles of association in 2004, which came to go along with the LSCIC2003 and its implementing regulations, were not clear in revealing the cooperative method referred to by the LSCIC2003.⁵⁶² They only establish that insurance must be concluded in a cooperative method,⁵⁶³ without revealing what is meant by that, how it is applied, or what principles it comprises. The cooperative notions, however, can be sensed in requiring that all insurance operations and related activities, e.g. reinsurance and investments, must conform to *Sharia'a*,⁵⁶⁴ and in allocating separate accounts for policy holders on one hand and shareholders on the other.⁵⁶⁵ Nonetheless, the distribution of surplus is still questionable, as it still allows shareholders to share the underwriting surplus, which must be for the sole benefit of the assureds. The percentages of that distribution can be determined by the board of directors;⁵⁶⁶ otherwise the 90% -10% distribution percentages in the

⁵⁶¹ Ibid.

⁵⁶² Art 1 LSCIC2003.

⁵⁶³ Art 3 NCCI Articles of Association. NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013.

⁵⁶⁴ Ibid.

⁵⁶⁵ Art 43 NCCI Articles of Association. NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013.

⁵⁶⁶ Ibid.

implementing regulations⁵⁶⁷ will be applied.⁵⁶⁸ Hence, it can be argued that companies can have the freedom to allocate a higher percentage of the net surplus to the assureds to reflect more genuine adherence to the distribution of the surplus principle in cooperative insurance. Nonetheless, such an argument ignores the conflict of interest which lies in the fact that the members of the board of directors are remunerated by the shareholders themselves.⁵⁶⁹ Accordingly, they will be more concerned about ‘pleasing’ shareholders than assureds, making the possibility of a more favourable distribution too farfetched to be seen in practice.

The other claims raised against the LSCIC2003 included the possibility in investing in trusts and governmental bonds which are believed to be tainted by *riba*,⁵⁷⁰ permitting reinsurance with commercial insurance companies,⁵⁷¹ and permitting life insurance prohibited by ‘*Hia’at Kibar Alulama*’,⁵⁷² thus making the LSCIC2003 not truly in accordance with *Sharia’a* law as applied in Saudi Arabia.⁵⁷³

⁵⁶⁷ Art 70 LSCIC2003 Implementing Regulations.

⁵⁶⁸ Art 47 NCCI Articles of Association sets that the LSCIC2003 and the companies regulations will be applied if matters are not included in the articles, NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013.

⁵⁶⁹ Art 44 NCCI Articles of Association. NCCI, *NCCI Articles of Association* (NCCI 1985) found in <<http://tawuniya.linkdev.com/pdfs/ArticleofAssociation.pdf>> accessed 23 May 2013.

⁵⁷⁰ Art 59–62 LSCIC2003 Implementing Regulations.

⁵⁷¹ Art 40–42 LSCIC2003 Implementing Regulations.

⁵⁷² Art 21 LSCIC2003 Implementing Regulations; See above.

⁵⁷³ A. Alatram comments on the LSCIC2003 Implementing Regulations, found in M. Ismeal, *Altamin Mn Almasaoleah Ala Hoadeth Alsearat Fe Almmlkh Alarbiah Alsaduiah* (Alfatah Press 2006) 168–171.

Based on the previous deliberations, this study concludes that the LSCIC2003 has filled the legal vacuum to a huge extent by organising the insurance market, protecting policy holders and strengthening the local economy. However, it did not succeed in unifying the insurance legal framework. The reason is that even though the law was nominally organising cooperative insurance, it actually contained conventional insurance principles, with the absence of many cooperative insurance principles and rules. Hence, a conventional organised system, tagged as cooperative, is trying to operate within the wider *Sharia'a* system which conflicts with it, creating a duality in the financial legal system similar to what existed before its promulgation. Moreover, it was observed that in a mature financial system, insurance companies must be able to invest in capital markets.⁵⁷⁴ However, since the capital market in Saudi Arabia is genuinely conventional, and insurance companies after the law must accord to *Sharia'a* in their investments, there will be difficulty in investing in the capital market, forming another type of duality in the financial system.⁵⁷⁵

III Insurance Contract Law

It must be borne in mind that the LSCIC2003 is a law organising the insurance business, and not the insurance contract itself. After the LSCIC2003, other important insurance regulations were announced by SAMA.⁵⁷⁶ Even though they are more concerned with governing the insurance contract, they cannot be considered as fully comprehensive codes. Instead, they

⁵⁷⁴ A. Marar, 'Saudi Arabia: The Duality in the Legal System and the Challenge of Adapting Law to Market Economies' (2004) 19 ALQ 91, 122.

⁵⁷⁵ Ibid.

⁵⁷⁶ The governor of SAMA has the right of approval on any regulation regards the control and supervision of insurance in Saudi Arabia, according to LSCIC2003 and the LSCIC2003 Implementing Regulations in Art 82.

provide some guidance to the legal relationship between the insurer and the assured. Those regulations include the ‘Insurance Market Code Of Conduct Regulation’ (IMCOCR),⁵⁷⁷ and the ‘Anti-Fraud Regulation’ (AFR),⁵⁷⁸ both approved in 2008.

The IMCOCR2008 explains the application of the minimum standards which must be practised by insurance and reinsurance companies (or their branches), and any service provider related to insurance when dealing with their clients.⁵⁷⁹ Its major goal is to “*to promote high standards of business conduct within the insurance industry.*”⁵⁸⁰ Hence, the regulation provides general principles and requirements for insurers which are related to integrity, skill, care and diligence, non-discrimination, security of customer assets, disclosure of information to clients, data protection, conflict of interest, and contracting with service providers.⁵⁸¹ Furthermore, it offers detailed market conduct standards which illustrate the minimum measures required by insurers when dealing with their clients. These measures are concerned with five main aspects within the insurance conduct, namely: the insurance policy formation and pricing, promoting and advertisement, presale customer contacts, the sale of

⁵⁷⁷ Approved by SAMA’s Governor by decision No 103/429, dated 8/9/2008; see <http://www.sama.gov.sa/Insurance/InssuranceLib/4600_C_InsuramarketCode_Ar_1429_09_16_V.pdf> accessed 21 September 2009.

⁵⁷⁸ Approved by SAMA’s Governor by decision No 124/429, dated 3/12/2008; see <http://www.sama.gov.sa/Insurance/InssuranceLib/4600_C_AntiFraud_Ar_1429_12_19_V2.pdf> accessed 21 September 2009.

⁵⁷⁹ Art 1 IMCOCR2008.

⁵⁸⁰ Art 2 IMCOCR2008.

⁵⁸¹ Prt A IMCOCR2008.

insurance products and services, and post-sale customer services.⁵⁸² The obligations of honest representation and duty of disclosure are noticed in various sections of the regulation, and are mostly related to the insurer. In the author's view, this seems a normal response to regain the confidence of the assured in the insurance market, as observed earlier.

The AFR2008 is another regulation with a main goal of promoting high standards for the detection of insurance fraud and its prevention.⁵⁸³ It contains general principles and minimum standards which the insurance business must comply with to prevent or minimise fraud.⁵⁸⁴ The standards are tailored specifically to fight internal fraud, intermediary fraud, and fraud by policy holders, through detection, measurement, mitigation and monitoring.⁵⁸⁵ Moreover, the regulation numerates in detail typical indicators for every type of fraud to alert the insurer.⁵⁸⁶

⁵⁸² Prt B IMCOCR2008.

⁵⁸³ Art 2 AFR2008.

⁵⁸⁴ Art 3 AFR2008.

⁵⁸⁵ Prt 3 AFR2008.

⁵⁸⁶ Table 1-3, AFR2008.

3.4 INSURANCE CONTRACTS ENFORCEMENT

3.4.1 Before The LSCIC2003

It is may be astonishing that even when insurance was flourishing in Saudi Arabia back in the 1970s, insurance contracts could not be enforced by courts.⁵⁸⁷ This fact created a dilemma for disputes, which could not be resolved without litigation, especially in the absence of a comprehensive insurance law for the guidance of the parties. According to article 443 of the CCL1931, all marine insurance cases were to be heard in front of the Commercial Court. However, the jurisdiction of commercial cases was passed, as previously mentioned, to the ‘Commercial Dispute Settlement Committee’, then to the Board of Grievance ‘*Diwan Almathalem*’.⁵⁸⁸ Unfortunately, the jurisdiction to hear insurance cases was not passed in the same manner as commercial cases, which created a real obstacle for insurance companies and international investors.⁵⁸⁹

It must be borne in mind that Saudi courts generally give great consideration to the view of the majority of scholars, and specifically on the *fatwa*, usually from ‘*Hia*’at Kibar Alulma’.⁵⁹⁰ Accordingly, general courts in Saudi Arabia, i.e. *Sharia*’a courts, which have general jurisdiction, refrained from hearing any insurance case, abiding by the *fatwa* prohibiting

⁵⁸⁷ M. Ismeal, *Altamin Mn Almasaoleah Ala Hoadeth Alsearat Fe Almmlkh Alarbiah Alsaudiah* (Alfatah Press 2006) 208.

⁵⁸⁸ See above under 3.2.

⁵⁸⁹ M. Ismeal, *Altamin Mn Almasaoleah Ala Hoadeth Alsearat Fe Almmlkh Alarbiah Alsaudiah* (Alfatah Press 2006) 208.

⁵⁹⁰ See above under 3.1.

commercial insurance.⁵⁹¹ Even the commercial departments in the Board of Grievance, which had the authority to entertain commercial cases, refrained from hearing insurance cases.⁵⁹² Their claim was that they hear cases only where a law concerning the case was issued, which was not in the case of insurance.⁵⁹³ Consequently, until 1985 insurance disputes were resolved by internal procedures by the Ministry of Commerce.⁵⁹⁴ After the presentation of both parties and the recording of their claims, the case was reviewed by legal consultants in Ministry.⁵⁹⁵ Then, the whole case file was transferred to the Ministry assistant representative of legal affairs, who transferred it to the Minister himself for approval, before announcing the decision to the parties. If any party desired to appeal, that was subject to the approval of the Minister. The Minister may permit the case to be viewed again by another legal consultant, or he may delegate the documents to the executive bodies to enforce the decision.⁵⁹⁶ However, it

⁵⁹¹ See also Art 1 The Law Of Procedure Before *Sharia'a* Courts (issued by Royal Decree M/21 in 21/8/2000); Art 1 of The Law Of Procedure Before the Board Of Grievance (issued by Royal Decree M/3 in 26/11/2013), which provides that the Board or the Court will apply *Sharia'a* law and any other secular laws which do not contradict *Sharia'a* law; N. Saleh, 'The Law Governing Contracts in Arabia' (1998) 38 Int'l and Comp LQ 761,764; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Law Series, Kluwer Law International 1996) 156–157; A. Haberbeck & M. Galloway, *Saudi Shipping Law* (Fairplay Publications 1990) 219; A. Haberbeck, 'Insurance Under Saudi Arabian Laws' [1986] LMCLQ 246, 247 .

⁵⁹² Ibid.

⁵⁹³ Ibid; Of course religious reservations about the insurance transaction was the main reason; Art 1 of The Law Of Procedure Before the Board Of Grievance (issued by Royal Decree M/3 in 26/11/2013) provides that the Board or the Court will apply *Sharia'a* law and any other secular laws which do not contradict *Sharia'a* law.

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid.

⁵⁹⁶ Ibid.

must be noted that if the case was related to subrogation, the dispute was resolved by the ‘Commercial Dispute Settlement Committee’, which did not consider the validity of the transaction in question.⁵⁹⁷

After 1985, all insurance disputes worth more than 500,000 SR, including subrogation claims, were referred to arbitration, and consequently must comply with the Arbitration Regulation 1983.⁵⁹⁸ Arbitration in Saudi Arabia is unique in its nature, specifically in requiring the approval of the Ministry of Commerce on the arbitration instrument which, must include certain details, namely: arbitrators’ names and expenses,⁵⁹⁹ parties’ names and claims, and agreement to refer to the arbitration committee.⁶⁰⁰ The arbitration file will be then transferred to the arbitration secretary in the Chamber of Industry and Commerce to begin the arbitration

⁵⁹⁷ Ibid.

⁵⁹⁸ Cases less than this amount will be transferred to the Ministry of Commerce after examination and recommendation to be ratified from the minister. That is to save time and money consumed in arbitration and to resolve these cases quickly; see Ministry of Commerce Technical Affairs Representative, Letter No 899, dated 15/9/1994; A. Alqarni, ‘Althakem Fe Munaza’at Alta’amin’ (Altahkim Mn Manthor Islame Wa Dwali Conference, Jeddah, 21–23 May 2003); A. Haberbeck & M. Galloway, *Saudi Shipping Law* (Fairplay Publications 1990) 219; A. Haberbeck, ‘Insurance Under Saudi Arabian Laws’ [1986] LMCLQ 246, 248-250.

⁵⁹⁹ The selection of arbitrators must comply with Art 4 of the Arbitration Regulation 1983 by Royal Decree M/46 dated 25/4/1983. The regulation is now superseded by the Arbitration Regulation 2012 by Royal Decree M/34 dated 16/4/2012.

⁶⁰⁰ A. Alqarni, ‘Althakem Fe Munaza’at Alta’amin’ (Altahkim Mn Manthor Islame Wa Dwali Conference, Jeddah, 21–23 May 2003); A. Haberbeck & M. Galloway, *Saudi Shipping Law* (Fairplay Publications 1990) 219 ; A. Haberbeck, ‘Insurance Under Saudi Arabian Laws’ [1986] LMCLQ 246, 248-250.

process.⁶⁰¹ After the award of arbitration decision by the arbitrators, the ratification of the Minister must be sought, who also has the authority to review the decision if one of the parties applied for that end.⁶⁰²

The main challenge at the time for arbitrators was the absence of a comprehensive insurance code.⁶⁰³ That challenge made it difficult to anticipate what interpretation will be adopted regarding policy terms in standard policies.⁶⁰⁴ Reference to other laws and jurisdictions was not of a huge benefit in this matter, unless there was no answer under Saudi law to the problem.⁶⁰⁵ It was only in marine insurance cases where the CCL1931 was used as a guide for arbitrators, even though its help was limited since it was out of date.⁶⁰⁶ The advantage perceived of such a law, however, was that it granted the contract parties a decent amount of freedom when concluding the insurance contract. Thus, problems generating from the interpretation of policy terms under Saudi law were avoided, when the policy was clearly drafted.⁶⁰⁷ Despite everything, complications deriving from the legal vacuum still had a chance to take place. One complication may be an interpretation tension between

⁶⁰¹ Ibid.

⁶⁰² Ibid.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid.

⁶⁰⁵ Ibid; Conflict of laws in Saudi Arabia pertains only to different interpretations of Islamic schools of law and courts do not apply governing law clauses in the contracts.

⁶⁰⁶ A. Haberbeck & M. Galloway, *Saudi Shipping Law* (Fairplay Publications 1990) 219; A. Haberbeck, 'Insurance Under Saudi Arabian Laws' [1986] LMCLQ 246, 248-250 .

⁶⁰⁷ Ibid.

international standard policies, such as Institute Cargo Clause (ICC) 'B', and the CCL1931.⁶⁰⁸ ICC 'B' covered loss attributable to collision⁶⁰⁹, while the CCL1931 in article 347 relieved the insurer from liability if the loss was attributable to the negligence of the crew or the master, unless the policy provided otherwise. If the policy was interpreted under Saudi law, i.e. the CCL1931, an assured may face a claim denying his right in indemnity, when a collision was attributable to negligence.⁶¹⁰ Consequently, it was apparent that the absence of a comprehensive insurance contract law in Saudi Arabia had a negative impact on determining the exact rights and obligations of the assured and the insurer, making it difficult to advise them in these matters.⁶¹¹

In respect to Cooperative Health Insurance Law, the violations of the law were heard in front of one or more committees formed by a decision from the president of the Council of Cooperative Health Insurance, which can suggest imposing a suitable sanction.⁶¹² The decision can be appealed after 60 days in front of the Board of Grievance.⁶¹³

⁶⁰⁸ Ibid.

⁶⁰⁹ ICC 'B', ss 1.1.4.

⁶¹⁰ A. Haberbeck & M. Galloway, *Saudi Shipping Law* (Fairplay Publications 1990) 219; A. Haberbeck, 'Insurance Under Saudi Arabian Laws' [1986] LMCLQ 246, 248-250.

⁶¹¹ Ibid.

⁶¹² Art 14 Cooperative Health Insurance Law 1999; Art 122 Cooperative Health Insurance Law 1999 Implementing Regulations.

⁶¹³ Ibid.

3.4.2 After The LSCIC2003

It is fair to say that the enforcing of insurance contracts in Saudi Arabia entered a new era after the promulgation of the LSCIC2003. The insurance market in the Kingdom was lacking a powerful judicial scheme for enforcing insurance contracts.⁶¹⁴ This lack was a chief impediment for international investments investing in Saudi Arabia, and a major concern for the insurance parties.⁶¹⁵ Regarding the assureds, the compulsory insurance on vehicles and foreign residents' health have emphasised their need for protection as weak parties in the contract.⁶¹⁶ It must be remembered that arbitration, although preferred by insurance companies to resolve disputes, is an expensive solution for many assureds especially consumers and small businesses. Regarding insurers, a powerful enforcement of the contract is needed for the continuity of the business and the stability of the insurance market. Thus, a legal regime for enforcing insurance contracts and resolving insurance disputes was articulated within the LSCIC2003 to inhibit such issues.⁶¹⁷

According to article 20 of the LSCIC2003, a committee (IVDRC) which will consist of three specialised members, with one of them being a legal consultant, is to be created and empowered to hear insurance disputes.⁶¹⁸ The committee will be under the supervision of SAMA and will resolve insurance disputes between insurance companies and clients, or

⁶¹⁴ See above under 3.4.1.

⁶¹⁵ Oxford Business Group, *The Report: Saudi Arabia 2009* (Oxford Business Group, 2009) 98; International Business Publications, *Saudi Arabia Investment and Business Guide* (Int'l Business Publications 2011) 124.

⁶¹⁶ See above under 3.3.1.

⁶¹⁷ See below.

⁶¹⁸ The Committee will be formed by an edict of the Council of Ministers, upon a recommendation by the Minister of Finance.

insurance companies and others in case of subrogation.⁶¹⁹ Moreover, the IVDRC is authorised to resolve any dispute relating to the violation of the regulatory and supervisory rules for insurance and reinsurance companies, and self-employed professionals relating to insurance.⁶²⁰

The Board of Grievance is the body authorised by the LSCIC2003 for any appeal against the decisions of the IVDRC.⁶²¹ It is also authorised to resolve all disputes between insurance companies and reinsurance companies or between those companies with each other, to resolve disputes relating to the violations of the law, and to enforce the sanctions set in article 21.⁶²² Also, the Board has the right to hear in the first instance claims which include a prison sentence by SAMA or the IVDRC.⁶²³

However, the LSCIC2003 does not provide an answer on how the Board of Grievance will take action if it accepts the appeal. Thus, the question is: will the Board review the case again regarding the subject of the case, or only regarding the law application?

⁶¹⁹ Art 20-22 LSCIC2003.

⁶²⁰ These include insurance brokers, insurance consultants, inspectors, loss adjusters, experts in settling insurance claims, and Actuaries; see Art 18 LSCIC2003; the IVDRC also hears health insurance dispute claims which are more than 100,000 riyals.

⁶²¹ Art 20 LSCIC2003.

⁶²² Art 22 LSCIC2003; Sanctions include fines and imprisonment or one of these sanctions.

⁶²³ Ibid.

It has been observed that in practice the Board, whether in its first degree departments or appeal departments,⁶²⁴ mostly did not review the subject of the case appealed, and only reviewed the appealed case in respect of the application of the law.⁶²⁵ The interesting point is that even in such a revision, the Board mostly did not seek to view the case regarding its conformity with the LSCIC2003 or the relating regulations. Instead it reviewed the admissibility of the insurance contract itself and its conformity with cooperative insurance principles and *Sharia'a* law.⁶²⁶ From the Board's perspective, what is practised in the insurance market is commercial insurance and not really cooperative. Hence, the judgments of the IVDRC are illegal, and they are outside their jurisdiction, which includes reviewing cooperative insurance cases and not commercial ones.⁶²⁷ Most of the appeals heard by the Board end either by rejection or by ruling that it is not admissible to be heard according to *Sharia'a* principles.⁶²⁸

The situation of the appealed cases in front of the Board was not acceptable. It resulted in technically aborting Art 20 of the LSCIC2003, losing the rights of the insurance parties, and unnecessary delays which end in rejection. Furthermore, it led to many criticisms from the

⁶²⁴ The Board of Grievance contains two degrees of litigation: first degree where it comprises commercial and administrative departments and second degree where it comprises appeal departments for cases heard in the first degree. In insurance cases, the appeal is resorted to the first degree departments, then the second degree departments in the board.

⁶²⁵ F. Alanazi, 'Ma'ogat Qda'a Altamin fe Almmalkah' *Alriyadh newspaper* (Riyadh, 10 July 2010) <http://www.aleqt.com/2010/07/12/article_417928.html?related> accessed 12 June 2012.

⁶²⁶ Ibid.

⁶²⁷ Ibid.

⁶²⁸ Ibid.

industry players, legal professionals, and academics, as it negatively affects the insurance industry in Saudi Arabia in general.⁶²⁹ One of the criticisms was that the Board of Grievance was not the body suitable for such role in the first place as it is not acquainted with the skills or knowledge regarding insurance, its technicalities, principles, and laws to be able to review the subject of insurance cases, or even their conformity with the related laws compared to the IVDRC.⁶³⁰ Such lack of knowledge led judges in the Board not to review the subject of the case. That means that, strangely, the first degree judicial resort is more expert and qualified to review insurance cases than the second degree judicial resort.⁶³¹ Adding to that, there is no comprehensive insurance contract law which can be resorted to in the revision of the subject of the case.⁶³²

After consideration of the aforementioned situation, the jurisdiction to hear the appealed insurance cases was removed from the Board of Grievance to an Insurance Appeal Committee (IAC), by a Royal Decree amending article 20 and 22 of the LSCIC2003.⁶³³ As

⁶²⁹ See for example, F. Alanazi, 'Ma'ogat Qda'a Altamin fe Almmlkah' *Alriyadh newspaper* (Riyadh, 10 July 2010) <http://www.aleqt.com/2010/07/12/article_417928.html?related> accessed 12 June 2012; A. Alhmaid, 'Lajnah Istanafiah Llnather fe Altathlmat thid Garart Lijan Fasal Almnaza'at Alta'aminieh' *Alriyadh newspaper* (Riyadh, 25 April 2011) <http://www.aleqt.com/2011/04/25/article_530817.html?related>

⁶³⁰ Ibid.

⁶³¹ Ibid.

⁶³² Ibid.

⁶³³ Royal Decree A/148 dated 10/11/2010.

mentioned earlier, the IVDRC was one of the semi judicial committees excluded from the ambit of the new JL2007, and from assimilation within the main judicial system.⁶³⁴

The amended article 22 of the LSCIC2003 provides that an Insurance Appeal Committee (IAC) is to be created from three full-time experts with knowledge and experience in insurance and Islamic jurisprudence '*Fiqh*'. The IAC will hear the appealed cases heard at first instance by the IVDRC, and their verdicts are final and cannot be appealed. Also, an amendment of article 20 of the LSCIC2003 allows the IVDRC, in addition to its aforementioned powers,⁶³⁵ to hear in the first instance the disputes between insurance companies and reinsurance companies, which was previously authorised for the Board of Grievance. Furthermore, the IVDRC will hear cases between the insurance companies and the self-employed professionals regarding the insurance activities. If any violation reviewed by the IVDRC can be considered a criminal offence which involves punishments, with imprisonment being one of them, the IVDRC must resort the case to the investigative authority concerned, paving the way for hearing the case by the criminal court.⁶³⁶ However, if the investigative authority observes that there is no case from a criminal point, the case will be returned to the IVDRC to review the violation against the LSCIC2003.⁶³⁷ It is worth mentioning that the new amendments add that the three members of the IVDRC must work

⁶³⁴ See above under 3.2 'Business Law And Court System'; Part 3, section 2 of the Executive Work Plan for Judiciary Law and Board of Grievance Law.

⁶³⁵ See above.

⁶³⁶ Amended Art 20 LSCIC2003.

⁶³⁷ Ibid.

on a full-time basis and be experts in insurance and *Fiqh*.⁶³⁸ Their membership of the IVDRC can be renewed once, for another three years.⁶³⁹

The main justifications for the amendments are to resolve the overlap in the jurisdiction of the insurance cases between the IVDRC and the Board of Grievance and specifically the right for any of them to handle litigation in the first instance, also to resolve the differences in approach between the IVDRC and the Board of Grievance in viewing the insurance cases, where the IVDRC views the case against the LSCIC2003 and its regulations, while the Board mostly views the essence of the insurance operation, whether it is cooperative or commercial according to *Sharia'a*.⁶⁴⁰ Adopting the amendments is hoped to positively affect the insurance industry and investments in insurance, provide assurance for the rights of the insurance parties, and stabilise the insurance market.⁶⁴¹ It is worth mentioning that the Cooperative Health Insurance Law 1999 emphasises that every insurance company must have a department for accepting and resolving complaints from beneficiaries. If that is not possible, the disputes will be heard by the IVDRC.⁶⁴²

In this author's view, although the LSCIC2003 developed the position of enforcing insurance contracts, it did not solve all the problems which existed before its promulgation.

⁶³⁸ Ibid.

⁶³⁹ Ibid.

⁶⁴⁰ See above; M. Alsalamh, 'Soog Alta'min Ttragb Lajnt Alista'naf Lfath Almnza'at' *Alriyadh newspaper* (Riyadh, 26 April 2012) <http://www.aleqt.com/2012/04/26/article_650986.html> accessed 12 June 2012.

⁶⁴¹ Ibid.

⁶⁴² Art 107 Cooperative Health Insurance Law 1999 Implementing Regulations.

Firstly, the legal nature of the IVDRC is unclear, which decreases the predictability needed in the legal system. The IVDRC is not a court or a part of the judicial system, and consequently it does not follow the procedures applied by courts in the selection or treatment of its members. Also, the IVDRC is under the supervision of SAMA, and not the Higher Judicial Council which usually supervises the courts in Saudi Arabia. However, appeals of the IVDRC decisions before the amendments of articles 20 and 22 of the LSCIC2003 were heard in front of a judicial body, i.e. the Board of Grievance. Hence, it is obvious that the legal position of the IVDRC is not clear in terms of whether it is a judicial or an administrative body. Therefore, clarity is urgently needed to remove any misconceptions regarding the legal authority or the power of IVDRC decisions from other judicial bodies.⁶⁴³ As mentioned, committees of such a nature are familiar in the Saudi commercial scene, where more than 70 of what are called ‘semi judicial committees’ have been formed, with nearly every commercial law promulgated.⁶⁴⁴ The new JL2007 assimilated these committees into the main

⁶⁴³ This unclear legal position of the IVDRC is similar to the position of the Banking Disputes Settlement Committee (BDSC). An on-going debate between SAMA and the Board of Grievance has taken place in the past years about the legal nature of BDSC. That debate has ended recently by a judgment from the Board of Grievance announcing that the BDSC is only an administrative and not a judicial body. The decision of the Board was based on the fact that BDSC members are not treated or selected like judges. Moreover, the BDSC is a part of SAMA, which is a part of the Ministry of Finance, which are all administrative and not judicial bodies, and usually administrative bodies do not contain judicial bodies unless the contrary was provided. If so, that would be a violation of the principle of separation between the authorities and the independence of the judiciary; see B, Albadrani, ‘Diwan Almathalm Yahsm Aljadr Alda’ar Haol Ganoneat Lagnt Tasweet Almunaza’at Almasrfiyah’ *Alriyadh Newspaper* (Riyadh, 17 January 2009).

⁶⁴⁴ See above under 3.2 ‘Business Law And Court System’.

judicial system within the Commercial Courts' jurisdiction,⁶⁴⁵ but the IVDRC was excluded until the Higher Judicial Council studies its situation.⁶⁴⁶ Therefore, hopes are on the results of the Higher Judicial Council study in that regard.

Secondly, in the absence of a comprehensive insurance code that governs the insurance contract, the role of the IVDRC will be hard, incomplete and limited. The legal vacuum in regulating the insurance contract has released it from any legal constraints outside the will of the parties. This situation has resulted in twisted and professionally drafted policies for the insurers' own benefits. Even though the IMCOCR2008 provides the IVDRC with some guidance regarding the relationship between the insurer and the assured, which improves the legal situation for the benefit of the assured, the IVDRC needs a more comprehensive insurance code to be a more effective tool in enforcing the insurance contracts.

Thirdly, forming the IVDRC to hear insurance disputes after the announcement of the LSCIC2003, and then excluding it from the ambit of the new JL2007, which merged most of the semi judicial committees into the judicial system, is a confirmation of former arguments in this thesis as to the inefficiency of the LSCIC2003 in removing the duality in the legal system.⁶⁴⁷

Before the announcement of the LSCIC2003, *Sharia'a* courts, which have general jurisdiction, refused to hear any insurance case claiming that insurance practised in the Kingdom was violating *Sharia'a* principles.⁶⁴⁸ The LSCIC2003 was then promulgated with

⁶⁴⁵ Art 9 JL2007; Part 1, section 9 of the Executive Work Plan for Judiciary Law and Board of Grievance Law 2007; See above.

⁶⁴⁶ Part 3, section 2 of the Executive Work Plan for Judiciary Law and Board of Grievance Law 2007.

⁶⁴⁷ See above under 3.3.

⁶⁴⁸ See above under 3.4.1

the aim of Islamising all insurance practices in the Kingdom.⁶⁴⁹ Nonetheless, the jurisdiction over insurance cases was passed to the IVDRC and not to *Sharia*'a courts or to the Board of Grievance entirely.⁶⁵⁰ Even after issuing the new JL2007, the jurisdiction of insurance cases was still in the hands of the IVDRC, as it was excluded from the application of the JL2007.⁶⁵¹ Adding to that, the jurisdiction of the insurance cases was totally removed from the judicial system by passing the powers of the Board of Grievance to the IAC.⁶⁵²

Based on the aforementioned, it is obvious that insurance after the LSCIC2003 is still conventional, even though tagged as cooperative or Islamic, and its solution to the legal duality is not genuine, but only cosmetic. If the LSCIC2003 has genuinely removed the legal duality and Islamised all insurance practices, the Board of Grievance, before the JL2007, or the Commercial Court, according to the new JL2007, would have full jurisdiction over insurance cases. It must be remembered that *Sharia*'a scrutiny is not absent within the main judicial system in Saudi Arabia.⁶⁵³ The Board of Grievance, as a judicial body, cannot

⁶⁴⁹ See above under 3.3.

⁶⁵⁰ Ibid; The Board used to hear only the appeals of insurance cases and some insurance cases in the first instance; see Art 20, 22 of the LSCIC2003 before the amendment.

⁶⁵¹ See above under 3.2 ; Part 3, section 2 of the Executive Work Plan for Judiciary Law and Board of Grievance Law 2007.

⁶⁵² See above; Amendment of Art 20 and 22 of the LSCIC2003 by Royal Decree A/148 dated 10/11/2010.

⁶⁵³ Art 1 of The Law Of Procedure Before the Board Of Grievance (issued by Royal Decree M/3 in 26/11/2013) provides that the Board will apply *Sharia*'a law and any other secular laws which do not contradict *Sharia*'a law; N. Saleh, 'The Law Governing Contracts in Arabia' (1998) 38 Int'l and Comp LQ 761, 764; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Law Series, Kluwer Law International 1996) 156–157.

contradict with Islamic law principles, and judges are *Sharia'a* law trained.⁶⁵⁴ Therefore, judges on the Board were put in a very critical position, as they were responsible for viewing cases which in their view do not comply with the prevailing legal system of the country.⁶⁵⁵ This position justified the fact that most appealed cases in front of the judges of the Board were either rejected or ruled incompatible with *Sharia'a* law.⁶⁵⁶

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid; See above.

⁶⁵⁶ Ibid; See above.

3.5 CONCLUSION

To conclude, it can be said that the influence of the supreme law of *Sharia'a* on the development of the legal insurance environment in Saudi Arabia cannot be denied. The *fatwa* which prohibits commercial insurance and permits cooperative insurance, may be considered the main factor for the official non-recognition of insurance and its immaturity in Saudi Arabia.⁶⁵⁷ Before the LSCIC2003, Saudi Arabia had not passed any insurance laws or regulations other than the old *Othmani* influenced CCL1931, and some laws promulgated for high necessities such as the Social Insurance Law 1969.⁶⁵⁸ Thus, the insurance market was operating chaotically and without any governmental control, through brokers and agents registered in foreign companies. This legal gap led assureds to lose their rights and confidence in the market, to investments escaping outside the Kingdom, and to the duality and inefficiency of the legal system.⁶⁵⁹ The author concluded that even the establishment of the NCCI did not solve the legal duality created by the operation of conventional insurance in a *Sharia'a* based system.⁶⁶⁰ The promulgation of the LSCIC2003 came to correct this dual situation and to Islamise all insurance practices by only permitting cooperative insurance companies to operate in the Kingdom. Even though this step organised the insurance practice dramatically and restored confidence in the market, this study illustrated that it suffered from serious pitfalls in revealing the cooperative notion for prospective insurance companies.⁶⁶¹

⁶⁵⁷ See above under 3.1.

⁶⁵⁸ See above under 3.2, 3.3.

⁶⁵⁹ See above under 3.3.

⁶⁶⁰ Ibid.

⁶⁶¹ Ibid.

Accordingly, insurance companies after the law were genuinely practicing commercial and not cooperative insurance, creating another form of duality in the system.⁶⁶²

Regarding the enforcement of insurance contracts in the Kingdom, it is fair to say that before the LSCIC2003, enforcement methods were not powerful enough to grant peace of mind for investors. They consisted of internal procedures by the Ministry of Commerce and arbitration according to Saudi law, but no substantial involvement of a judicial body.⁶⁶³ Nevertheless, after the LSCIC2003, the IVDRC was formed, as a specialised body to hear insurance disputes and to enforce insurance contracts and regulations, with appeals being entertained by the Board of Grievance, which are now to be passed to IAC.⁶⁶⁴ Despite reservations on the legal position of the IVDRC and its efficiency in removing the legal duality, the author cannot deny that it is a positive improvement to the enforcement of insurance contracts. However, it is recommended that the legal nature of the IVDRC should be clarified, and hopefully assimilated into the JL2007, as with the other committees.⁶⁶⁵ However, such assimilation cannot be realised unless the LSCIC2003 is revised to be a genuine cooperative Islamic insurance regulation. If such a route were taken, the IVDRC could easily be assimilated within the main judicial system since the cases will accord with *Sharia'a* law. Nonetheless, with the exclusion of the IVDRC and the creation of another committee for insurance appeals,⁶⁶⁶ it seems that such assimilation will not be seen in the near future.

⁶⁶² Ibid.

⁶⁶³ See above under 3.4.1.

⁶⁶⁴ See above under 3.4.2.

⁶⁶⁵ Ibid.

⁶⁶⁶ Ibid.

Now that the background of insurance laws and enforcement in Saudi Arabia have been reviewed, this thesis will dwell on the roots of the duty of good faith by examining it in general contract laws in English and Saudi legal systems. This can provide more understanding of its significance to each system and its development into insurance laws.

CHAPTER 4

THE DUTY OF GOOD FAITH BETWEEN ENGLISH AND ISLAMIC GENERAL CONTRACT LAWS

4.1 INTRODUCTION

Fair dealing in standard commercial practice is a very important principle in the business world today. This concept is promoted by notions of justice and equality and is imbedded in most law systems in the world, especially civil law systems, under the term 'good faith'.⁶⁶⁷ On the other hand, common law systems were more reluctant to introduce this concept, unless it was for certain types of contracts which are identified as *uberrimae fidei*, or contracts of utmost good faith, and that includes the contract of insurance.⁶⁶⁸ English law is an example of such a jurisdiction which, even influenced by perceptions of good faith, did not distinguish a neat, clear doctrine framing it, relying more on the *caveat emptor* principle.⁶⁶⁹ The English law position towards the good faith doctrine was brought into the spotlight, being a common law country under the umbrella of the EU. The EU introduced a Directive on unfair terms in consumer contracts,⁶⁷⁰ which was implemented by Unfair Terms in Consumer Contracts Regulations 1994,⁶⁷¹ and was then replaced in 1999⁶⁷² (UTCCR1999). The UTCCR1999 required a duty of good faith in consumer contracts falling into the scope of the regulation.⁶⁷³ Moreover, some common law jurisdictions introduced a good faith requirement in their laws,

⁶⁶⁷ For example, see Art 1134 of the French Civil Code; Art 242 of the German BGB.

⁶⁶⁸ MIA1906, s 17; *Carter v Boehm* (1766) 3 Burr 1905.

⁶⁶⁹ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 [439] (Bingham LJ); *Walford v Miles* [1992] 2 AC 128.

⁶⁷⁰ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Terms in Consumer Contracts Directive).

⁶⁷¹ Unfair Terms in Consumer Contracts Regulation 1994, SI 1994/3159.

⁶⁷² Unfair Terms in Consumer Contracts Regulation 1999, SI 1999/2083.

⁶⁷³ UTCCR1999, SI 1999/2083, reg 5.

e.g. the US,⁶⁷⁴ making English law increasingly out of the trend taken by most jurisdictions.⁶⁷⁵

It may be argued that English law is not unique in its position regarding good faith in contracts, and that Islamic law does not recognise this concept either, even though it is a law that aspires to religious principles encouraging justice and equality.⁶⁷⁶ The argument is that you cannot find an expressed concept of good faith in Islamic law as it is in Western laws.⁶⁷⁷ Thus, it may be concluded that Islamic and English laws share this position regarding the duty of good faith in general contracts. However, this chapter challenges such a view. The present chapter will contribute towards providing a background to the duty of good faith in general contract law in both English and Saudi laws. This is important in order to comprehend the depth and the roots of the concept and its significance in both systems, which in its turn affects the perception of the duty in insurance laws. The hierarchy of priorities affecting the protection of interests for each system which will be included in the chapter will explain the different views of good faith in English and Saudi general contract laws, forming the main basis for the approach towards the duty in the insurance laws of both systems.

⁶⁷⁴ See Uniform Commercial Code, ss 1-304, 1-201; Restatement (Second) of Contracts, s 205.

⁶⁷⁵ R. Zimmerman and S. Whittaker, 'Good Faith in European Contract Law: Surveying the legal landscape' in R. Zimmerman and S. Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2008)14-15.

⁶⁷⁶ See N. Foster, 'Islamic Commercial Law (II): An Overview. Some Principles and Rules' (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009.

⁶⁷⁷ Ibid.

The chapter will begin by viewing the doctrine of good faith in English general contract law and then highlighting its equivalent in Islamic law which is the general contract law in Saudi Arabia, by explaining some general principles of Islamic contract law linked to fair dealing including the protective system of ‘options’. Also, it will emphasise the *Quranic* verses and the Prophet’s *Hadiths* and traditions, revealing *Sharia*’s encouragement to good faith and just business bargains. After viewing the theoretical aspect of ‘good faith’, the author will highlight its practical implications, which include misrepresentation and non-disclosure in both systems. The author will also emphasise the remedial measures taken by Islamic law to any misrepresentation or non-disclosure, i.e. the theory of defects of consent which includes fraud. This study, concentrates mainly on the *Hanbali* school of Islamic law, which is officially applied in Saudi Arabia as a substitute for a contemporary civil code. Moreover, in this comparison, following the general approach of the thesis, Islamic law will be the focal system, with English law being more of a lens through which to view its disparities or similarities.

4.2 THE DUTY OF GOOD FAITH IN ENGLISH GENERAL CONTRACT LAW

Generally speaking, there is no doctrine of good faith in English general contract law.⁶⁷⁸ Nonetheless, good faith can have an impact on articulating the principles of contract law, as when the reasonable expectations of honest men are defeated, the result will be subject to ‘*rigorous examination*’ to see if the law is unfair; on the other hand, this does not authorise the judge to deviate from a binding authority.⁶⁷⁹

⁶⁷⁸ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 [439] (Bingham LJ), where it was stated that: “*In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table.’ It is in essence a principle of fair open dealing... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.*”; See also *Walford v Miles* [1992] 2 AC 128 [138] (Ackner L), where the House of Lords did not support the validity of an obligation to negotiate in good faith. It was indicated that the duty to negotiate in good faith holds a high level of uncertainty to be enforceable, and it is against the nature of the opposite interests of the parties which are in negotiation. Unless there is a misrepresentation, every party is free to follow their interests when negotiating. Hence, even if parties negotiate in bad faith, there will no liability unless there is a misrepresentation. Such a decision makes it more challenging to recognise a general doctrine of good faith in English contract law by courts. The case pertained to the negotiations period, and not to the period after entering into a contractual relationship and the occurrence of the obligations on each party; See J. Chitty, *Chitty on Contracts: General Principles*, vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 1-039; E. McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 491-497.

⁶⁷⁹ See *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194 [196] (Steyn L J) where it was indicated that the protection of reasonable expectation is an “*objective*” and “*moulding force*” to contract law, not just a principle.

In any case, not recognising a general doctrine of good faith in English general contract law does not mean that it encourages parties to behave in bad faith, as it deals with different situations of bad faith by different methods.⁶⁸⁰ Thus, it can be said that the difference between English law and other civil law countries is a difference in articulation and not in essence, as they will mostly reach the same conclusions.⁶⁸¹ As support for this argument, it was observed that even EU members do not have a uniform concept of the term ‘good faith’.⁶⁸² Moreover, British lawyers are not wholly alien to the notion of good faith, as it was highlighted by Lord Mansfield back in the 18th century, in the context of insurance contracts and in the MIA1906 which announced that the insurance contract is a contract of utmost good faith or *uberrimae fidei*.⁶⁸³ Accordingly, the difference must not be exaggerated.⁶⁸⁴ However, the MIA1906 did not provide a definition of utmost good faith, even if it entitled either of the parties to avoid the contract if it was not observed.⁶⁸⁵ All it provided was that the insured must disclose all

⁶⁸⁰ Ibid; See R. Brownsword, *Contract Law: Themes for the Twenty First Century* (2nd edn, OUP 2006) 120–121; See also M. Clarke, ‘The Common Law of Contract in 1993: Is there a General Doctrine of Good Faith?’ (1993) 23 HKLJ 318, 320; E. McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 499–501 ; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

⁶⁸¹ Ibid.

⁶⁸² E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 489–490 ; *Director General Of Fair Trading v First National Bank* [2001] UKHL52, [2002] 1 AC 481 [17] (Bingham L), [36] (Steyn L).

⁶⁸³ Ibid; *Carter v Boehm* (1766) 3 Burr 1905; MIA1906, s 17, even though no definition of the term good faith was provided; See Ch 5 for more details.

⁶⁸⁴ E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 489–490; *Director General Of Fair Trading v First National Bank* [2001] UKHL52, [2002] 1 AC 481 [17] (Bingham L), [36] (Steyn L).

⁶⁸⁵ MIA1906, s 17; See Ch 5 for more details.

material information to the insurer, since he is in a stronger position to know about them.⁶⁸⁶ Also, the requirement of good faith included in the UTCCR1999 can create a difficulty to English lawyers and judges since there is no general doctrine of good faith in English law to make reference to.⁶⁸⁷ Another point is that in *Walford v Miles*⁶⁸⁸ there was no liability imposed on negotiating in bad faith but with no misrepresentation. Such an approach does not fulfil the reasonable expectations of honest men, and the Unidroit principles emphasised liability in such cases, even though they admit that parties are free in their negotiations and that there is no liability for failing to reach an agreement in general.⁶⁸⁹

Including an express duty to negotiate in good faith in the contract may solve the dilemma to a certain extent since there is hesitance towards not enforcing a contractual express obligation.⁶⁹⁰ However, the result is not decisive as it can be argued that an express obligation to negotiate in good faith can be uncertain in the same way as an implied obligation, and therefore it should not be enforceable.⁶⁹¹

⁶⁸⁶ MIA 1906, s 18; See Ch 5 for more details.

⁶⁸⁷ E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 489-490.

⁶⁸⁸ [1992] 2 AC 128.

⁶⁸⁹ J. Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433,439.

⁶⁹⁰ *Petromec Inc v Petroleo Brasileiro SA Petrobras (No 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121 [121] (Longmore LJ) where it was stated "*I do not consider Walford v Miles binds us to hold that the express obligation to negotiate as contained in clause 12.4 of the Supervision Agreement is completely without legal substance*"; A. Mills & R. Loveridge, 'The Uncertain Future of *Walford v Miles*' [2011] LMCLQ 528.

⁶⁹¹ As a reduction of uncertainty, courts can concentrate on the parties acting in bad faith reflecting a more cautious approach to the concept of good faith as indicated by Longmore LJ (*Petromec Inc v Petroleo Brasileiro SA Petrobras (No 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121 [121] (Longmore LJ); J. Steyn,

Generally three main approaches towards the introduction of good faith in English contract law are observed.⁶⁹² The first approach is against introducing this concept into English law.⁶⁹³ It argues that such a concept will: undermine the ‘individualistic ethics’ of English contract law by considering the other party’s expectations,⁶⁹⁴ create complications in enquiring into the contractors’ state of mind,⁶⁹⁵ constrain the autonomy of the will,⁶⁹⁶ and not suit the different contracting contexts, e.g. the commodities market where opportunism must be accepted.⁶⁹⁷ Additionally, it was advocated that good faith is a vague idea which consists of moral standards, but with no clear yardstick to use in judging this morality.⁶⁹⁸ It does not answer which/whose morality to consider, or on what level of contracting it is required. Such absence of clear moral standards leads to uncertainty in answering many important questions, e.g. does the concept add to the regulation of bad faith or contain both negative and positive

‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 LQR 433, 502; E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 496-497).

⁶⁹² These approaches are discussed in R. Brownsword, *Contract Law: Themes for the Twenty First Century* (2nd edn, OUP 2006).

⁶⁹³ R. Brownsword, *Contract Law: Themes for the Twenty First Century* (2nd edn, OUP 2006) 114-120.

⁶⁹⁴ Ibid; see also *Walford v Miles* [1992] 2 AC 128 [133]-[140] (Ackner L).

⁶⁹⁵ Ibid; See also E. McKendrick, ‘Good Faith: A Matter of Principle?’ in A. Forte (ed), *Good Faith in Contract and Property Law* (Hart 1999) 39.

⁶⁹⁶ Ibid.

⁶⁹⁷ Ibid; See also E. McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 498.

⁶⁹⁸ Ibid.

requirements, and does it regulate matters of procedure or also include matters of contractual substance?⁶⁹⁹

On the other hand, the proponents of a good faith regime refuted all these arguments by stating that good faith: solves the problem of bad faith in a direct manner,⁷⁰⁰ brings the law closer to the reasonable expectations of the parties, enhances the autonomy of the will, facilitates justice, is important for successful economies,⁷⁰¹ and brings English law closer to other jurisdictions and international regulations such as the Unidroit principles.⁷⁰² Regarding the uncertainty argument, it was argued that courts can support contractual interpretations of good faith, which respond to the diverse expectations depending on the case and the context in question.⁷⁰³

Among these opposite views, a more neutral view has developed which cannot be ignored.⁷⁰⁴ This view does not object to the good faith doctrine; however, it argues that English law comprises ‘piecemeal provisions’ which regulate fair dealing as equivalent to good faith.⁷⁰⁵

⁶⁹⁹ Ibid; See also E. McKendrick, ‘Good Faith: A Matter of Principle?’ in A. Forte (ed), *Good Faith in Contract and Property Law* (Hart 1999) 39.

⁷⁰⁰ Ibid 123-130; That can be helpful in the law concerning the incorporation of unusual terms in the contract: See E. McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 502-504, See also *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 [439] (Bingham LJ).

⁷⁰¹ Ibid.

⁷⁰² E. McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 502-504.

⁷⁰³ R. Brownsword, *Contract Law: Themes for the Twenty First Century* (2nd edn, OUP 2006) 123–130.

⁷⁰⁴ Ibid 120-121.

⁷⁰⁵ Ibid.

Therefore, it seems worthless to recognise a general doctrine in the shadow of these provisions.⁷⁰⁶ In other words, there are rules in English contract law which illustrate the application of good faith, yet are not under one unified concept of good faith, e.g. doctrine of promissory estoppel.⁷⁰⁷ Moreover, English law has its own tools to arrive to the same results of other jurisdictions; for example, the doctrine of frustration in English law solves the impossibility of contract performance which is solved in German law by applying the doctrine of good faith.⁷⁰⁸

Nonetheless, the historical position of English contract law in not recognising a general doctrine of good faith has been challenged recently, where it was found that a general duty of good faith can be implied in the contract in certain circumstances.⁷⁰⁹ In *Yam Seng Pte Limited v International Trade Corp Ltd*,⁷¹⁰ Mr Justice Leggatt, even though stating at the beginning that he “*doubts that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts*”,⁷¹¹ found in the first instance in the context of a distribution

⁷⁰⁶ Ibid; The neutral view is inclined more towards the negative view.

⁷⁰⁷ Ibid; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; see also M. Clarke, ‘The Common Law of Contract in 1993: Is there a General Doctrine of Good Faith?’ (1993) 23 HKLJ 318; E. McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 499-501.

⁷⁰⁸ Ibid; E. McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014) 499-501.

⁷⁰⁹ *Yam Seng Pte Limited v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd’s Rep 526 [119]-[154] (Leggatt J).

⁷¹⁰ [2013] EWHC 111 (QB), [2013] 1 Lloyd’s Rep 526.

⁷¹¹ *Yam Seng Pte Limited v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd’s Rep 526 [131] (Leggatt J); See also *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

agreement between the above parties, that a general duty of good faith can be implied in commercial contracts depending on the construction of the contract, the presumed intentions of the parties, and the background surrounding the contract formation which is the English law approach of implying terms of fact.⁷¹² This background is not only limited to matters of fact which are known to the parties, but also includes “shared values” and “norms of behaviour” which go without saying and do not need to be written in the contract.⁷¹³ This implied duty is also responsive to the context of the contract, as some commercial contracts with long-term commitment need greater levels of trust between the parties and that is implied in the parties’ comprehension when performing the contract and is important to provide “business efficacy”. These contracts which are “relational” include agreements of joint ventures and long-term distributorship agreements as in *Yam Seng*.⁷¹⁴ Such implied duty will not have the danger of limiting the parties and their freedom to follow their interests since it relies on their presumed intentions, and its extent can be amended by incorporating express terms.⁷¹⁵ The test of good faith here is objective, as even though it is responsive to the context of the contract, it relies on what is considered unacceptable commercial behaviour according to the reasonable expectation of those who are honest and reasonable, and not according to the specific party’s view of unacceptable commercial behaviour.⁷¹⁶ In other

⁷¹² Ibid [131]-[132] (Leggatt J); *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 ; *Investors Compensation Scheme Ltd v West Bromwich Building Society (No1)* [1998] 1 WLR 896.

⁷¹³ Ibid [133]-[140] (Leggatt J); *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), [2007] 3 EGLR 101; *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch), [2010] CILL 2908 ; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyd’s Rep 61.

⁷¹⁴ Ibid [141]-[144] (Leggatt J).

⁷¹⁵ Ibid [148]-[149] (Leggatt J).

⁷¹⁶ Ibid [144] (Leggatt J); *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378.

words, the “presumed intentions” of the parties are considered, not their real intentions. It was stated that such implied duty is not a novel principle of English contract law as it is part of protecting reasonable expectations,⁷¹⁷ and it can be manifested in several well established cases.⁷¹⁸ The duty of good faith was addressed again in *Mid Essex Hospital Services NHS Trust v Compass Group UK And Ireland Ltd (Trading as Medirest)*⁷¹⁹ and in *TSG Building Services PLC v South Anglia Housing Limited*.⁷²⁰ However, in both cases it was held that an implied duty of good faith cannot be found; as such implied duty cannot restrict a contractual term.⁷²¹ Also, in both cases there was a provision of an express duty of good faith in the contract, but it was narrowly construed.⁷²²

⁷¹⁷ Ibid [145] (Leggatt J); *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194, 196; J. Steyn, ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 LQR 433,438.

⁷¹⁸ For example, in deciding that the right awarded to one party by a contractual term which will have an impact on both parties must be used in an honest manner and in good faith, and for the goal of its award. It cannot be used in an “arbitrarily , capricious, or irrational” manner, (*Abu Dhabi National Tanker Co v Product Star Shipping (The Product Star) (No 2)* [1993] 1 Lloyd’s Rep 397, *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 287, [2005] ICR 402, *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No 2)* [2008] EWCA Civ 116, [2008] 1 Lloyd’s Rep 558 and *JML Direct Ltd v Freestat UK Ltd* [2010] EWCA Civ 34), also in that commercial relationships are based on the assumption of honesty between parties (*HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] 2 Lloyd’s Rep 61). Additionally it can be observed in deciding the implication of cooperating to perform the contract (*Mackay v Dick* (1881) 6 App Cas 251 [263]), and in deciding that to enforce an unusual or burdensome term in the contract, the party who wants to rely on it must bring it to the attention of the other party (*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433).

⁷¹⁹ [2013] EWCA Civ 200, [2013] BLR 265.

⁷²⁰ [2013] EWHC 1151 (TCC), [2013] BLR 484.

⁷²¹ In both cases an express duty of good faith is provided in the contract; In *TSG*, the judge has construed the express duty of good faith narrowly in the contract providing it applied only to the points mentioned in the

4.2.1 The UTCCR1999 And The Requirement Of Good Faith

I UTCCR1999 General Approach:

clause, and did not extend to the termination clause, considering the construction of the contract and what is reasonably understood from it against the background it was made in. Therefore, there was no breach of the express duty of good faith (see judgment at [32], [36]-[42]). The judge found that there is no implied duty of good faith in the contract, as parties had express terms of good faith regarding certain points, and an implied duty could not have been seen as restricting the parties' express contractual terms which provided that either of them can terminate the contract for any reason before the period of four years (see judgment at [51]); In the *Mid Essex* case, in the first instance, the judge held that Mid Essex was in breach of its express duty to cooperate in good faith, and was in breach of an implied duty of good faith, in not to act in an "irrational, arbitrary or capricious" fashion, when using its right in deducting payments and calculating service failure points. However, that was not supported by the Court of Appeal, which held that an implied duty of good faith cannot limit the parties' express terms under the contract which provided for deduction of payments, and if there were any issues with the calculations or deductions, that would be a breach of an express contractual term of the clause that provided for those deductions, not the implied duty of good faith (see judgment at [84]-[95]). Also the court construed the express duty to cooperate in good faith narrowly, and found that Mid Essex was not in breach of it, as it was required only in two situations, and there was not a breach in either of those two situations (see judgment at [97]-[121]) The discretion given to Mid Essex in this case was viewed as different from the discretion in other authorities such as *The Product Star*, *Socimer*, and *JML* cases, as it does encompass not using a right under the contract.

⁷²² Ibid; If the express duty was general, it will be uncertain and courts may refuse it since it will be just like an implied obligation (J. Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 LQR 433, 502 ; E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 496-497).

It must be noted that the UTCCR1999 applies to contracts between consumers and businesses whether sellers or suppliers.⁷²³ The UTCCR1999 provides for the purpose of evaluating the fairness of a term that,

*“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”*⁷²⁴

Therefore, the assessment of ‘fairness’ under the UTCCR1999 will apply only to contractual terms which are not negotiated individually e.g. standard terms.⁷²⁵ The term will be unfair if it is in contradiction with the good faith requirement, *“causes a significant imbalance in the parties' rights and obligations arising under the contract, to detriment of the consumer”*.⁷²⁶

The most evident problems with the provision seem to be the relationship between 'good faith' and the 'significant imbalance', as well as the meaning of 'good faith'.⁷²⁷ In respect of the first issue, questions can arise as to whether to treat the two terms as one requirement, two related requirements, or two separate requirements.⁷²⁸ Is contradicting good faith an inevitable consequence of the significant imbalance (one requirement), or can the significant imbalance

⁷²³ UTCCR1999, SI 1999/2083, reg 4(1).

⁷²⁴ UTCCR1999, SI 1999/2083, reg 5 (1).

⁷²⁵ See UTCCR1999, SI 1999/2083, reg 5(2) where it provides that *“A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.”*

⁷²⁶ UTCCR1999, SI 1999/2083, reg 5 (1).

⁷²⁷ E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 458-482.

⁷²⁸ Ibid.

be considered a threshold to contradicting good faith which excludes insignificant imbalances (two related requirements)?⁷²⁹ How can we differentiate between contradicting good faith and significant imbalance if we treat them as two separate terms?⁷³⁰ Concerning the second issue, the dilemma originates from the absence of a national reference of good faith in English law.⁷³¹ Where this doctrine is absent, English courts must interpret it in light of its European origin driven from the Unfair Terms in Consumer Contracts Directive.⁷³²

First, it must be noted that the overall legislative technique in structuring the UTCCR1999 was a 'copy out' from the Unfair Terms in Consumer Contracts Directive⁷³³ This approach was adopted for various reasons, such as avoiding liability which may incur on the member state from failing to implement the Directive in the correct way.⁷³⁴ The 1994 Regulations, which elaborated beyond the Directive, were replaced by the UTCCR1999 to avoid such results.⁷³⁵

⁷²⁹ Ibid.

⁷³⁰ Ibid.

⁷³¹ Ibid.

⁷³² Ibid; Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

⁷³³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29; E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 458-482.

⁷³⁴ E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 458-482 .

⁷³⁵ Ibid; Also, the 1994 Regulations did not have private and state enforcement mechanisms as required by the Directive, so the UTCCR1999 came to have such effect; See R. Merkin, 'Unfair Terms in Insurance Contracts' (2012) *Insurance Law Journal*, 23(3) 272.

When looking closely at the 1994 Regulations, one can notice that they include an assessment of the term 'good faith' which aims to support English courts in their interpretation of such an absent term in national law.⁷³⁶ However, this interpretation was removed in the UTCCR1999 in an attempt to stick more to the Directive texts. This 'copy out' approach from the Directive has an important result regarding the interpretation of the Regulations generally and specifically the term 'good faith'.⁷³⁷ Therefore, a Directive driven interpretation of the term must be adopted by English courts rather than trying to interpret it as a national law.⁷³⁸ Nevertheless, this was not applied by the court in the leading case of *Director General of Fair Trading v First National Bank*.⁷³⁹ The case illustrated that English courts were not precise in the definitions of good faith and significant imbalance, adopting more of a flexible approach in interpretation.⁷⁴⁰

⁷³⁶ See Unfair Terms in Consumer Contract Regulations 1994, SI 1994/3159, sch 2, s 4(3) which provides,

“In making an assessment of good faith, regard shall be had in particular to —

(a) the strength of the bargaining positions of the parties;

(b) whether the consumer had an inducement to agree to the term;

(c) whether the goods or services were sold or supplied to the special order of the consumer, and

(d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer.”

⁷³⁷ E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 460.

⁷³⁸ Ibid.

⁷³⁹ [2001] UKHL 52; [2002] 1 AC 481; the case concerned the application of the 1994 Regulations but it is relevant to the UTCCR1999, SI 1999/2083 as well.

⁷⁴⁰ The House of the Lords in the past case interpreted good faith as a notion of “*fair and open dealing*”; See *Director General of Fair Trading v First National Bank* [2001] UKHL 52; [2002] 1 AC 481 [17] (Bingham L), where it was stated that:

The main argument against the decision in the case was that it did not refer to the European Court of Justice (ECJ) in its interpretation of the term 'unfair'.⁷⁴¹ Lord Bingham noticed this issue but was of the view that the language was clear and did not reasonably incur a difference in interpretations.⁷⁴² However, the dilemma is that every member state has a different interpretation of the term 'good faith', something observed by the Lord Bingham himself.⁷⁴³ The review of 'fairness' under the UTCCR1999 which will apply to standard contract terms, i.e. not individually negotiated, will consider the circumstances surrounding

“Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice.” ; Steyn L at [36] referred to the Principles of the European Contract law prepared by the European Commission when explaining the purpose of good faith and rejected any purely procedural interpretation of the term; In regards the significant imbalance, Bingham L at [17] stated that *“The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour”*, whereas Steyn L at [37] has observed an overlap between the concepts of good faith and the significant imbalance.

⁷⁴¹ See M. Dean, 'Defining Unfair Terms in Consumer Contracts - Crystal Ball Glazing?' *Director General of Fair Trading v. First National Bank* (2002) 65 (5) MLR 773.

⁷⁴² *Director General of Fair Trading v. First National Bank* [2001] UKHL 52, [2002] 1 AC 481 [17] (Bingham L).

⁷⁴³ *Director General of Fair Trading v. First National Bank* [2001] UKHL 52, [2002] 1 AC 481 [17] (Bingham L); E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 489-490.

the conclusion of the contract, the nature of the goods and services, and the rest of the terms in the contract or in any other contract relying on it.⁷⁴⁴ The UTCCR1999 has excluded from its ambit terms which define the core subject of the contract,⁷⁴⁵ and which relate to the price suitability for the services or goods,⁷⁴⁶ provided that these terms are all in “*plain intelligible language*”.⁷⁴⁷ If there is any uncertainty as regards the construction of a term, the

⁷⁴⁴ UTCCR1999, SI 1999/2083, reg 6(1).

⁷⁴⁵ UTCCR1999, SI 1999/2083, reg 6(2) (a); See *Office of Fair Trading v Ashbourne Management Services Ltd & Ors* [2011] EWHC 1237 (Ch), [2011] ECC 31, where a minimum duration clause was not considered core to the definition of the subject matter of the contract.

⁷⁴⁶ UTCCR1999, SI 1999/2083, reg 6(2)(b) ; See *Office of Fair Trading v Abbey National plc* [2009] EWCA Civ 116, [2009] 2 WLR1286, [2009] UKSC 6, [2010] 1 AC 696, [2009] UKSC 6, [2010] 1 AC 696, approach where the Supreme Court construed the exemption in the UTCCR1999, reg 6(2)(b) widely, and refused that the exemption is only limited to price clauses which are core, and held that it also includes ancillary charges. Thus, not following *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481 approach in construing the exemption narrowly by considering that the two subsections of the UTCCR1999, reg 6 (2) are related, in the sense that the exemption of the price of the service relates only to the core price and not the ancillary charges. However, the approach of the *Office of Fair Trading v Abbey National plc* [2009] EWCA Civ 116, [2009] 2 WLR1286, [2009] UKSC 6, [2010] 1 AC 696 was heavily criticised and was not supported by the regulatory bodies: the Office of Fair Trading (OFT) and the Financial Services Authority (FSA) (Now the FCA), as the approach of *Director General of Fair Trading v First National Bank plc* [2001] UKHL52, [2002] 1 AC 481, in the narrow construction of the exemption was predominant; For academic criticisms of the decision see: M. Chen-Wishart, ‘Transparency and Fairness in Bank Charges’ (2010) 126 LQR 157; P. Davies, ‘Bank Charges in the Supreme Court’ (2010) 69(1) Cambridge Law Journal 21; P. Morgan, ‘Bank Charges and the Unfair Terms in Consumer Contracts Regulations 1999: the end of the road for consumers?’ [2010] LMCLQ 208; D. Cabrelli & R. Zahn, ‘Challenging Unfair Terms: Some Recent Developments’ (2010) Juridical Review 115; For the position of the OFT and FCA see : The Law Commission and Scottish Law Commission, *Unfair Terms in consumer Contracts: A New Approach* (Issue Paper , 2012) paras 6.31-6.51.

⁷⁴⁷ UTCCR1999, SI 1999/2083, reg 6.

UTCCR1999 gives preference to the construction which benefits the consumer the most, supporting the *contra proferentem* principle already adopted by common law principles.⁷⁴⁸ In any case, if the term is not in “*plain and intelligible language*”, it will not benefit from the exemption and will be considered for fairness under the UTCCR1999, even if it is core or relates to the price.⁷⁴⁹

It must be noted that at the time of writing this thesis, the Consumer Rights Bill has been introduced to the Parliament on the 23rd of January 2014.⁷⁵⁰ The Bill as far as unfair consumer contract terms are concerned consolidates the Unfair Contract Terms Act 1977 (UCTA1977) and the UTCCR1999 into one piece of legislation to prevent any overlap between the provisions or inconsistency.⁷⁵¹ It also makes some changes and clarifications to the

⁷⁴⁸ UTCCR1999, SI 1999/2083, reg 7; However, that does not forbid application for injunctive relief under UTCCR1999, SI 1999/2083, reg 12; See also *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch), [2008] 3 EGLR 61 for the application of *contra proferentem* principle in common law as the most favourable interpretation was given to the consumer regarding two terms which conflict with each other.

⁷⁴⁹ UTCCR1999, SI 1999/2083, reg 6.

⁷⁵⁰ Consumer Rights HC Bill (2013-14) [180]; The Law commissions produced a report on the issue of unfair terms aiming for a unified regime, and a draft Bill in February 2005 which were not taken forward (The Law Commission And The Scottish Law Commission, *Unfair Terms In Contracts* (Law Com No 292, Scot Law Com No 199, 2005) found in <http://lawcommission.justice.gov.uk/consultations/unfair_consumer_contracts.htm> accessed 15 April 2014) . In 2012, the Law Commissions reviewed the issue again concentrating on the exempted terms and produced a discussion paper on the issue in March 2013 (The Law Commission and The Scottish Law Commission, *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* found in <http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf> accessed 15 April 2014.

⁷⁵¹ See The Law Commission And The Scottish Law Commission, *Explanatory Notes on Consumer Rights Bill* (2013-14) found in <<http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0161/en/14161en.htm>>

exemptions from the fairness test under the UTCCR1999, and to the non-exhaustive grey list.⁷⁵²

The UTCCR1999 will be replaced by the Bill, while the UCTA1977 will be amended to include only contractual relationships between business to business and consumer to consumer, as the consumer to business relationships will be covered by the Bill.⁷⁵³ It must be noted that insurance contracts are excluded from the ambit of the UCTA1977 as regards the restrictions placed on the exclusion of liability for negligence resulting in death or personal injury, and they are excluded from clause 65 which concerns the same issue in the Consumer Rights Bill.⁷⁵⁴

Part 2 of the Consumer Rights Bill is the part dedicated to the unfair consumer contract terms, and its scope applies to contracts between consumers and traders - “consumer contracts”,⁷⁵⁵ as well as “consumer notices”,⁷⁵⁶ which can be contractual or non- contractual,⁷⁵⁷ but does not

accessed 15 April 2014 , para 281; see also The Law Commission And The Scottish Law Commission, *Unfair Terms In Contracts* (Law Com No 292, Scot Law Com No 199, 2005) found in <http://lawcommission.justice.gov.uk/consultations/unfair_consumer_contracts.htm> accessed 15 April 2014.

⁷⁵² The Law Commission And The Scottish Law Commission, *Explanatory Notes on Consumer Rights Bill* (2013-14) found in <<http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0161/en/14161en.htm>> accessed 15 April 2014, para 281.

⁷⁵³ Ibid, para 24.

⁷⁵⁴ Sections 2-4 in the UTCA1977 do not apply to insurance contracts, see UTCA1977, sch 1; Consumer Rights Bill, cl 66(3).

⁷⁵⁵ Consumer Rights Bill, cl 61(1).

⁷⁵⁶ Ibid, cl 61(4),(7).

⁷⁵⁷ Ibid, cl 61(8).

include employment contracts⁷⁵⁸ or employment notices.⁷⁵⁹ Consumer notices must be relevant to the duties and rights between the consumer and the trader and intend to limit or remove the liability of the trader towards the consumer.⁷⁶⁰ There is no need to express that the notice will apply to the consumer if it can be assumed reasonably that it is set for the purpose of viewing it or hearing it by a consumer.⁷⁶¹

Clause 62 of the Bill⁷⁶² sets the requirements of the term or notice to be fair. If the term in a consumer contract or consumer notice is evaluated for fairness and was rendered to be unfair, the effect is that it will not bind the consumer.⁷⁶³ The contract, on the other hand, will persist as long as it is possible.⁷⁶⁴ However, if the consumer decides to depend on the term or notice, he will be allowed to do so.⁷⁶⁵ The definition of ‘unfair’ for the consumer contract term or consumer notice is where “*contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer*”.⁷⁶⁶ The assessment of the term’s fairness will consider the nature of the contract’s

⁷⁵⁸ Ibid, cl 61(2).

⁷⁵⁹ Ibid, cl 61(5).

⁷⁶⁰ Ibid, cl 61(4).

⁷⁶¹ Ibid, cl 61(6).

⁷⁶² The clause brings UTCCR1999, SI 1999/2083, reg 5, 6 and UTCA1977, ss 4, 11 together.

⁷⁶³ Consumer Rights Bill, cl 62(1),(2).

⁷⁶⁴ Consumer Rights Bill, cl 67; This replaces UTCCR1999, SI 1999/2083, reg 8(1).

⁷⁶⁵ Ibid, cl 62(3).

⁷⁶⁶ Ibid, c l 62(4) for terms in consumer contract; cl 62(4) for consumer notices; This replaces the UTCCR1999, SI 1999/2083, reg 5(1).

subject matter,⁷⁶⁷ and the circumstances surrounding the term's agreement and the other terms in the rest of the contract or in other contracts that rely on it.⁷⁶⁸ The fairness test will not affect the terms in subsection 8 which are considered void, as they will be void regardless of being fair or unfair under the test.⁷⁶⁹

The Consumer Rights Bill in clause 63⁷⁷⁰ sets a non-exhaustive list in part 1 of schedule 2 which lists some terms which can be regarded as unfair (grey list) which mirrors the list in the UTCCR1999.⁷⁷¹ Nonetheless, some necessary terminology changes were included to fit the Bill and, most importantly, three further examples were inserted in the list namely: paragraphs 5, 12, and 14.⁷⁷² Such a list helps the court in its assessment as to the fairness of a term but it does not mean that the term is unfair straightaway, and the court can still find

⁷⁶⁷ Ibid, cl 62(5)(a); This replaces UTCCR1999, SI 1999/2083, reg 6(1).

⁷⁶⁸ Ibid, cl 62(5)(b); Ibid.

⁷⁶⁹ The Law Commission And The Scottish Law Commission, *Explanatory Notes on Consumer Rights Bill* (2013-14) found in <<http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0161/en/14161en.htm>> accessed 15 April 2014, para 286.

⁷⁷⁰ The provision will replace UTCCR1999, SI 1999/2083, reg 6(2).

⁷⁷¹ UTCCR1999, SI 1999/2083, reg 5(5) ; sch 2.

⁷⁷² This is according to the suggestions of the Law Commission in their report in March 2013; The Law Commission and The Scottish Law Commission, *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* found in <http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf> accessed 15 April 2014.

terms outside of the list to be unfair by applying the fairness test.⁷⁷³ The scope of part 1 of the schedule is determined by part 2, and the terms in part 2 can still be evaluated for fairness except if they are exempted under clause 64 (i.e. they are “transparent” and “prominent”) or 73. On the other hand, the terms in the grey list in part 1 can always be assessed for fairness even if they are exempted under clause 64 (i.e. they are “transparent” and “prominent”).⁷⁷⁴

Clause 64 of the Bill explains when a term is exempted from the assessment for fairness under clause 62 and the requirements for such exemption to take effect.⁷⁷⁵ To be specific, the Bill states that a term will be exempted from the evaluation for fairness if it identifies the core subject matter of the contract,⁷⁷⁶ or if it relates to the suitability of the price paid.⁷⁷⁷ However, for the exemption to take effect, the term must be “transparent” (“in plain and intelligible language and (in the case of a written term) is legible”) ⁷⁷⁸ and “prominent” (i.e. drawn to the attention of the consumer in a manner where an average consumer will be alert to the existence of such a term).⁷⁷⁹ The average consumer is a consumer who is cautious, vigilant and well informed.⁷⁸⁰

⁷⁷³ See Case C-478/99 *Commission of the European Communities v Kingdom of Sweden* [2002] ECR I-4147; Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (Court of First Chamber, 26 April 2012).

⁷⁷⁴ Consumer Rights Bill, cl 64(4).

⁷⁷⁵ Replaces UTCCR1999, SI 1999/2083, reg 6(2).

⁷⁷⁶ Ibid, cl 64(1)(a).

⁷⁷⁷ Ibid, cl 64(1)(b).

⁷⁷⁸ Ibid, cl 64(2),(3).

⁷⁷⁹ Ibid, cl 64(2),(4).

⁷⁸⁰ Ibid, cl 64(5).

It must be noted that traders are required to ensure transparency in their written terms in consumer contracts and consumer notices, and “transparent” will have the same meaning as above.⁷⁸¹ Also, if such terms have the possibility of different interpretations, the one which is more advantageous for the consumer will be applied,⁷⁸² subject to certain exceptions.⁷⁸³ The enforcement of the Bill for unfair consumer contract terms and notices will be upon the Competition Market Authority (CMA) and other Regulators, instead of the Office of Fair Trading (OFT) and the powers they possess are stated in schedule 3.⁷⁸⁴ It is worth mentioning that the Bill places an obligation on the court to raise the issue of the fairness of the term if the parties did not raise the issue or did not have the intention to do so, subject to the existence of enough material to assess the term’s fairness.⁷⁸⁵ The Bill also deals with secondary contracts where the above rules can be applicable even if those contracts are not between consumers and traders except in the case of claims settlement contracts arising from the main contract.⁷⁸⁶

⁷⁸¹ Ibid, cl 68; replaces UTCCR1999, SI 1999/2083, reg 7(1); That can be similar to the duty of disclosure on insurers at the stage of policy formation.

⁷⁸² Ibid, cl 69(1); replaces UTCCR1999, SI 1999/2083, reg 7(2).

⁷⁸³ Ibid, cl 69(2).

⁷⁸⁴ Ibid, cl 70; see also Sch 5; replaces UTCCR1999, SI 1999/2083, reg 10-15.

⁷⁸⁵ Ibid, cl 71; C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421, para 38; C-243/08 *Pannon GSM Zrt. v Erzsébet Sustikné Győrfi* [2009] ECR I-4713, para 35; Case C-137/08 *VB Pénzügyi Lízing Zrt. v Ferenc SchneiderVB* [2010] ECR I- 10847.

⁷⁸⁶ Ibid, cl 72, 72(4).

II The Application of UTCCR1999 On Insurance Contracts:

In insurance contracts concerning consumers, the ‘unfairness’ of a term can emerge in private litigation, where the issue will depend mainly on the facts of each case.⁷⁸⁷ Nonetheless, most of the cases emerge in front of the Financial Services Authority FSA (now the Financial Conduct Authority FCA) which is the body that has jurisdiction over insurance and banking cases, and which is authorised to require the financial provider/ insurer to amend the unfair term to comply with the UTCCR1999.⁷⁸⁸ Mostly the offending financial provider/ insurer will undertake to amend the unfair term, but in the few cases where it does not, the FCA will apply for an injunctive relief to stop the insurer from relying on the term;⁷⁸⁹ however, such challenge is not evidenced in the context of insurance yet.⁷⁹⁰ Hence, when looking at the application of the UTCCR1999 on insurance contracts, the cases that will be considered will include: the few private litigation cases which highlighted some legal rules and the large number of FCA cases where the insurer has undertaken to amend the term to

⁷⁸⁷ R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 277.

⁷⁸⁸ Ibid; The Office of Fair Trading (OFT) is given general jurisdiction over unfair terms in consumer contracts where it delegates its powers to the FCA as regards some financial cases including banking and insurance. They are independent bodies; however, they cooperate with each other for the benefits of the consumers and businesses; See: OFT & FCA, *Memoranda of understanding between the OFT and the FCA* (OFT & FCA, 2013) <http://www.oft.gov.uk/shared_of/MoUs/FCA_MOU.pdf> accessed 21 Sep 2013.

⁷⁸⁹ R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 277 ; See: FCA, ‘FCA cases’ (FCA library) <<http://www.fsa.gov.uk/doing/regulated/uct/library>> accessed 14 Sep 2013; UTCCR1999, SI 1999/2083, reg 12; See also *Office of Fair Trading v Foxtons Ltd* [2009] EWCA Civ 288, [2010] 1 WLR 663.

⁷⁹⁰ R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 277.

comply with the UTCCR1999 requirement of fairness.⁷⁹¹ It must be noted that the application of the UTCCR1999 by the Financial Ombudsman Service (FOS) which views complaints in insurance cases filed by consumers and small businesses⁷⁹² on insurance cases is not really evident.⁷⁹³

To assess the fairness of a term, there are three considerations to take into account as mentioned earlier, namely: that it violates good faith, that it causes “*significant imbalance to the parties*”, and that it is a “*detriment to the consumer*”.⁷⁹⁴ These considerations have different definitions;⁷⁹⁵ nonetheless, in respect of the individual rights which insurers expect

⁷⁹¹ Ibid; FCA, ‘FCA cases’ (FCA library) <<http://www.fsa.gov.uk/doing/regulated/uct/library>> accessed 14 Sep 2013.

⁷⁹² The FOS is considered a cheap and fast alternative to courts in resolving disputes. The FOS and the FCA are independent bodies; however, they cooperate with each other especially regarding consumer cases which have wide harmful effects; See FCA & FOS, *Memoranda of understanding between FCA and FOS* (FCA & FOS, 2013 <http://www.financial-ombudsman.org.uk/about/FOS-OFT_MoU.pdf> accessed 21 Sep 2013.

⁷⁹³ See J. Summer, *Insurance Law And The Financial Ombudsman Service* (Informa, 2010) para 5.69 ; The FOS is not bound by applying strict law and applies what it considers *fair and reasonable*, see: The FSA handbook, Dispute Resolution: Complaints (DISP) 3.6.1. Also adjudicators are not trained on a legal basis and there is no consistency in the decisions, and precedents are not followed; See R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) *Insurance Law Journal*, 23(3) 272, 284; W. Merricks ‘The Jurisprudence of the Ombudsman’ (Conference on Insurance Contract Law: Winds of Change, Cambridge, 6 April 2001). The FOS stated in the context of extending the UTCCR1999 protection to microbusinesses that “*We do not apply these Regulations to those commercial policyholders who presently fall within our jurisdiction...*”: See The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: Micro-Businesses, Should Micro-Businesses be treated like Consumers for the Purposes of Pre-Contractual Information and Unfair Terms?* (Issue Paper 5, 2009) para 4.12.

⁷⁹⁴ UTCCR1999, SI 1999/2083, reg 5(1); See above under ‘UTCCR1999 General Approach’.

⁷⁹⁵ See *Jetstar Airways Pty Ltd v Free* [2008] VSC 539.

to hold, they usually seem to flow jointly in practice.⁷⁹⁶ The individual rights which insurers hold can be straightforward.⁷⁹⁷ For example, in an FCA case, there was an individual right held by the insurer to change the premiums/charges on a life insurance policy.⁷⁹⁸ However, these individual rights can be less direct and more embedded between the lines of the policy.⁷⁹⁹ These include uncertain terms which give discretion to the insurer to decide their meanings. For example, in a motor insurance policy,⁸⁰⁰ the insurer provided that when the policy is cancelled by either of the parties, the refund will be calculated based on its “*short period rates in force*”. The FCA view was that such terms may incur unfairness as they give too much discretion to the insurer, regarding deciding the rate and accordingly the refund; they were not clear or defined, and were not comprehensible by consumers.⁸⁰¹

⁷⁹⁶ R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 280.

⁷⁹⁷ Ibid.

⁷⁹⁸ PPP Lifetime Care Plc undertaking, part of the AXA group of insurers Lifetime Care – Plans and Bonds (5 April 2006) found in <http://www.fsa.gov.uk/pubs/other/undertaking_ppp.pdf> accessed 20 Sep 2013.

⁷⁹⁹ R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 280.

⁸⁰⁰ BISL Limited undertaking in relation to motor insurance terms and conditions for policies administered by it (11 Feb 2013) found in <<http://www.fca.org.uk/your-fca/documents/undertakings/fsa-bisl-limited-motor-insurance-policies>> accessed 15 Sep 2013.

⁸⁰¹ Ibid; See also RBS Insurance firms undertaking in relation to Direct Line and all other pet insurance policies (25 November 2011) found in <http://www.fsa.gov.uk/pubs/other/rbs_insurance_undertaking.pdf> accessed 16 Sep 2013; Legal and General Insurance Ltd undertaking in relation to its home insurance essentials policy (14 December 2011) found in <<http://www.fsa.gov.uk/pubs/other/lg-insuranceundertaking.pdf>> accessed 16 Sep 2013.

Another type of unfairness which can be observed in the insurance context is when the policy has a false coverage, even though no ambiguity in the terms is evidenced.⁸⁰² For example, in a payment protection policy,⁸⁰³ the cancellation clause provided that the insurer has the right to retain the premiums after the period for statutory cancellation, even if the assured returned the loaned amount early.⁸⁰⁴ The FCA demanded the insurer undertake to amend the unfair term, since it restricts the assured to a policy with no benefit, while the insurer will not be bearing the risk anymore.⁸⁰⁵

As seen earlier, insurance contract terms can face claims of ‘unfairness’ in various forms; however, not all of these will fall into the scope of the UTCCR1999, as they can be exempted from its ambit according to Regulation 6 of the UTCCR1999 mentioned earlier.⁸⁰⁶ The exemption is applicable only if the term comes in “*plain and intelligible language*”.⁸⁰⁷ The FCA approach is that if the term involves discretion given to the insurer, or any ambiguity, it will not be exempted from the application of the UTCCR1999 as it will not be in “*plain and intelligible language*” and will probably be considered unfair.⁸⁰⁸ As the FCA is faced with

⁸⁰² R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 281.

⁸⁰³ Amtrust International Underwriters Ltd undertaking in relation to payment protection insurance policy (June 2006) found in <http://www.fsa.gov.uk/pubs/other/undertaking_amtrust.pdf> accessed 19 Sep 2013; see also Norwich Union Insurance undertaking in relation to payment protection insurance policy (June 2006) found in <http://www.fsa.gov.uk/pubs/other/undertaking_norwich.pdf> accessed 19 Sep 2013.

⁸⁰⁴ Ibid.

⁸⁰⁵ Ibid.

⁸⁰⁶ See above under ‘UTCCR1999 General Approach’.

⁸⁰⁷ UTCCR1999, SI 1999/2083, reg 6(2).

⁸⁰⁸ UTCCR1999, SI 1999/2083, reg 6 (2); The ambiguity will lead to significant imbalance, and it violates openness and fair dealing, and it is detrimental to the consumer, for example see : BISL Limited undertaking

such uncertainty in terms of most of its insurance cases,⁸⁰⁹ the differentiation in Regulation 6(2) between core and ancillary terms defining the subject matter of the contract, and between terms which relate or not to the suitability of the price of the service, will not be really evident in insurance cases, as the term will be considered anyway because of its ambiguity.⁸¹⁰

Matters related to the price can be observed occasionally in FCA cases. For example, in a life policy⁸¹¹ there were terms which gave the insurer the unilateral right to make variation in premiums and charges without any specification of the reasons in the contract. The terms were considered unclear; therefore inside the ambit of the UTCCR1999, even they relate to

in relation to motor insurance terms and conditions for policies administered by it (11 Feb 2013) found in <<http://www.fca.org.uk/your-fca/documents/undertakings/fsa-bisl-limited-motor-insurance-policies>> accessed 15 Sep 2013; RBS Insurance firms undertaking in relation to Direct Line and all other pet insurance policies (25 November 2011) found in <http://www.fsa.gov.uk/pubs/other/rbs_insurance_undertaking.pdf> accessed 16 Sep 2013; Legal and General Insurance Ltd undertaking in relation to its home insurance essentials policy (14 December 2011) found in <<http://www.fsa.gov.uk/pubs/other/lg-insuranceundertaking.pdf>> accessed 16 Sep 2013. For more, see FCA, 'FCA cases' (FCA Library) <<http://www.fsa.gov.uk/doing/regulated/uct/library>> accessed 14 Sep 2013.

⁸⁰⁹ Ibid.

⁸¹⁰ R. Merkin, 'Unfair Terms in Insurance Contracts' (2012) Insurance Law Journal, 23(3) 272, 282.

⁸¹¹ Prudential International undertaking (23 Dec 2004) found in <<http://hb.betterregulation.com/external/Undertakings%20%20Prudential%20International%20Assurance%20plc.pdf>> accessed 20 Sep 2013; PPP lifetime care plc undertaking, part of the AXA group of insurers Lifetime Care – Plans and Bonds (5 April 2006) found in <http://www.fsa.gov.uk/pubs/other/undertaking_ppp.pdf> accessed 20 Sep 2013.

the price.⁸¹² This situation was considered also as one of the cases which may indicate unfairness as mentioned in the non-exhaustive list in the UTCCR1999.⁸¹³

Examples of FCA cases regarding matters related to core terms defining the subject matter are also noticed. For instance, in a pet insurance policy⁸¹⁴ which included a term that the insurer will not be liable for paying treatment charges which are not regarded as “*reasonable or necessary*”, and thus giving the insurer discretion on payment, the FCA was of the view that even though the term may define the contract subject, it is not in “*plain and intelligible language*” as it contains vagueness; therefore it is not exempted from the UTCCR1999.⁸¹⁵ The term has the potential to cause significant imbalance to the parties and to be detrimental to the consumer, and it may violate fair and open dealing, and therefore be potentially unfair.⁸¹⁶

⁸¹² Ibid.

⁸¹³ UTCCR1999, SI 1999/2083, sch 2(1)(j).

⁸¹⁴ See RBS Insurance firms undertaking in relation to Direct Line and all other pet insurance policies (25 November 2011) found in <http://www.fsa.gov.uk/pubs/other/rbs_insurance_undertaking.pdf> accessed 16 Sep 2013.

⁸¹⁵ Ibid; See also a similar approach by the FCA in Legal and General Insurance Ltd undertaking in relation to its home insurance essentials policy (14 December 2011) found in <<http://www.fsa.gov.uk/pubs/other/lg-insuranceundertaking.pdf>> accessed 16 Sep 2013, where the FCA decided that a term’s effect concerning damages in a house insurance policy is not clear and thus not in *plain intelligible language*, which makes it within the assessment of the UTCCR1999; See The Law Commission and Scottish Law Commission, *Unfair Terms in consumer Contracts: A New Approach* (Issue Paper , 2012) paras 6.49-6.51.

⁸¹⁶ Ibid.

An important and difficult issue to be stressed is deciding whether the term is core or ancillary, and accordingly in or out of the ambit of the UTCCR1999. Recital 19 in the Unfair Terms in Consumer Contracts Directive provided that:

“In insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer’s liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer.”

However, the differentiation between terms which define the risk and the other terms which do not is not easy. An insurer can use different methods to define the insured risk or its liability.⁸¹⁷ For example, to insure a car which is fitted with a burglar alarm, the insurer can define the risk as a car with a burglar alarm, which will mostly be regarded as core and out of the UTCCR1999 ambit. However, the insurer can use an exclusion clause, a condition precedent, a duration clause, a warranty, a suspension of coverage clause providing the same definition of the risk (even though the effect of every clause on coverage can differ), but with less certain effect as regards being out of the ambit of the UTCCR1999.⁸¹⁸

The UTCCR1999 gives a non-exhaustive list of clauses which may suggest unfairness (Grey List).⁸¹⁹ The clauses which can apply to insurance include: binding terms on consumers which they did not have the chance to read before finalising the contract, and which cannot be reversed;⁸²⁰ clauses which allow the supplier/insurer to make changes in terms including the

⁸¹⁷ R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 282-283.

⁸¹⁸ Ibid.

⁸¹⁹ UTCCR1999, SI 1999/2083, sch 2(1).

⁸²⁰ UTCCR1999, SI 1999/2083, sch 2(1)(i).

price on a unilateral basis with no valid justification written in the contract;⁸²¹ and clauses giving rights to the supplier/insurer only to cancel the contract upon its discretion.⁸²²

It is worth mentioning that the reference made by insurers to “consequential loss” (indirect consequences of the insured risks) in consumer general insurance contracts is not regarded as “*plain and intelligible*” according to a statement by the FCA in July 2008.⁸²³ The reason given was that the meaning of consequential loss is not comprehensible by consumers and therefore violates Regulation 6 of the UTCCR1999.⁸²⁴

In private litigation cases, different approaches can be observed as regards the application of the UTCCR1999 on insurance cases and the differentiation between ancillary and core terms. For example, in *Bankers Insurance Co Ltd v South*,⁸²⁵ which is a case involving a

⁸²¹ UTCCR1999, SI 1999/2083, sch 2(1) (j); See also *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch).

⁸²² UTCCR1999, SI 1999/2083, sch 2 (1)(f); Also the examples include clauses which provide for arbitration before the dispute for amounts which are less than 5000, but if the amount is more than 5000, the reasonableness test is applied, see: UTCCR1999, sch 2(1)(q). However, clauses which provide for arbitration after the dispute are allowed, see: Arbitration Act 1996, s 89-91. It must be noted that arbitration clauses in the insurance context are not used in consumer contracts, and even in business contracts they are limited to quantum disputes, see: R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 278. It is accepted that terms mentioned in the list will not be exempted from the application of UTCCR1999, see: The Law Commission and Scottish Law Commission, *Unfair Terms in consumer Contracts: A New Approach* (Issue Paper, 2012) para 9.52

⁸²³ See FCA, *Statement on using the words 'consequential loss' in general insurance contracts* (FCA 25 Jul 2008) <http://www.fsa.gov.uk/pubs/other/consequential_loss.pdf> accessed 12 Sep 2013

⁸²⁴ Ibid

⁸²⁵ [2003] EWHC 380 (QB), [2004] Lloyd's Rep IR 1; It must be noted that the 1994 Regulations were applied on this case.

travel insurance policy, the policy had an exclusion clause excluding any remuneration or related charges to the use of “*motorised waterborne craft*”. The exclusion was considered an unambiguous core term, and therefore out of the ambit of the 1994 Regulations, and did not need to be assessed for fairness, in respect of a jet ski injury claim by the assured.⁸²⁶

Also, in the previous case, there were terms in the policy which provided for a notice requirement which had to be done by the assured to the benefit of the insurer when any circumstances which may have led to a claim occurred, together with giving the insurer any documents or written information required. Non-compliance with these terms which were viewed as condition precedents would exclude the insurer from its liability to pay the claim to the assured.⁸²⁷ The assured claimed that the insurer was liable to pay the claim because: the terms must not be construed as conditions precedent, and the impact of non-compliance with the terms is minor, as the insurer was not really harmed from such non-compliance.⁸²⁸ Additionally the assured claimed unfairness of the condition precedents as they excluded the insurer from liability for non-compliance, even if he/she was not really harmed.⁸²⁹

It was held that the terms were in fact conditions precedent according to the construction of the policy.⁸³⁰ The conditions precedent were considered inside the ambit of the 1994 Regulations being ancillary terms, clear and understood by a reasonable assured, and brought to his attention, but were held to be ‘unfair’ because of their harsh effects in depriving the

⁸²⁶ *Bankers Insurance Co Ltd v South* [2003] EWHC 380 (QB), [2004] Lloyd's Rep IR 1 [13]-[28] (Buckley J).

⁸²⁷ Ibid [29].

⁸²⁸ Ibid [30].

⁸²⁹ Ibid [31].

⁸³⁰ *Bankers Insurance Co Ltd v South* [2003] EWHC 380 (QB), [2004] Lloyd's Rep IR 1 [31]-[41] (Buckley J).

assured from coverage, with no prejudice to insurers, causing significant imbalance between the parties, which is determinant to the assured.⁸³¹

Nonetheless, in *Parker v National Farmers Union Mutual Insurance Society Ltd*⁸³² a different view was adopted, where a condition precedent assessed under the UTCCR1999 being an ancillary and clear term, was held not to be ‘unfair’.⁸³³ In that case it was claimed that a general condition precedent in the policy to give the insurer any written information and documents it asks for, in the event of anything happening that may have lead to a claim was ‘unfair’.⁸³⁴ The claim referred that ‘unfairness’ was observed as the condition was not confined to material, reasonable or related information, required strict compliance, and entitled to automatic discharge by the insurer without notice or chance for remedying the breach, even though it may have been related to an immaterial or minor breach.⁸³⁵ Nonetheless, it was found that the term was fair according to the UTCCR1999, as it did not cause “significant imbalance between the parties”.⁸³⁶ In fact, the request for information and documents by the insurer does remedy the asymmetry in information that exists between the

⁸³¹ Ibid.

⁸³² [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep IR 25.

⁸³³ *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep IR 253.

⁸³⁴ *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep IR 253 [186].

⁸³⁵ Ibid.

⁸³⁶ *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep IR 253 [189] (Teare J).

assured and the insurer, since the information requested is within the control of the assured.⁸³⁷ Also, it is implied that any right conferred by the contract to one of the parties must be used in a reasonable manner,⁸³⁸ and therefore the right to request written information or documents must be related at least to the claim of the assured as a common law principle.⁸³⁹ The insurer cannot reject the claim, even for not complying with the condition precedent set by him unreasonably as he will be subject to ICOBS 8.1.1. Hence, the issues raised by the claimant are not applicable to the ‘unfairness’ of the condition precedent under the UTCCR1999, as they are resolved by law of insurance and the insurance regulations of the FCA.⁸⁴⁰ The case is significant in the sense that it illustrates a tendency to undermine the UTCCR1999 to the benefit of the general insurance law and the insurance regulations.⁸⁴¹ This is observed in *Direct Line Insurance Plc v Fox*⁸⁴² as well, as it was held that a provision to

⁸³⁷ Ibid.

⁸³⁸ Ibid; *The Vainquer Jose* [1979] 1 Lloyd’s Rep 557; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No2)* [2001] EWCA Civ 1047, [2001] Lloyd’s Rep IR 667 [62]-[66].

⁸³⁹ *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd’s Rep IR 253 [189]-[190] (Teare J).

⁸⁴⁰ *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd’s Rep IR 253 [189]-[190] (Teare J) ; Additionally, issues relating to the UTCCR1999, SI 1999/2083, reg 7 are not raised (in particular what is embedded in UTCCR1999, SI 1999/2083, reg 7(1) “*seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.*”), as well as issues of not including the consequences of non-compliance with policy conditions which violates good faith.

⁸⁴¹ R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) *Insurance Law Journal*, 23(3) 272, 281-282.

⁸⁴² [2009] EWHC 386 (QB), [2010] Lloyd’s Rep IR 324.

cancel the policy from the date of fraud is not ‘unfair’ under the UTCCR1999 since it is already a common law principle.⁸⁴³

In respect of the remedies which are available in case of breaching the UTCCR1999, they mostly do not suit insurance contracts.⁸⁴⁴ The UTCCR1999 provides that a term which is unfair will not be binding on the parties, and the contract containing it will continue to be binding without it, if that is possible.⁸⁴⁵ Nonetheless, the application of the remedy on an unfair term which is unclear does incur some difficulties.⁸⁴⁶ For example, if an unclear clause covering building defects in a house policy issued for that end is regarded unfair, the clause will not be binding on the parties. Also the contract will not be binding as it will not be able to continue without the clause, which makes it void. The result of losing coverage under the policy in that way is not beneficial for the assured with a claim. The situation can be resolved by asserting common law principles in contract construction, and not asserting unfairness under the UTCCR1999.⁸⁴⁷

If the unfair term is ancillary, the same problems will persist, and the judicial solutions to alter the remedy to make it more suitable were seen as ‘wrong’ considering the Directive.⁸⁴⁸

⁸⁴³ See also *Direct Line Insurance v Khan plc* [2001] EWCA Civ 1794, [2002] Lloyd's Rep IR 364 where a similar approach regards fraudulent claims is applied.

⁸⁴⁴ R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 283-284.

⁸⁴⁵ UTCCR1999, SI 1999/2083, reg 8.

⁸⁴⁶ R. Merkin, ‘Unfair Terms in Insurance Contracts’ (2012) Insurance Law Journal, 23(3) 272, 283-284.

⁸⁴⁷ Ibid.

⁸⁴⁸ Case C-618/10 *Banco Español de Crédito SA v Camino* [2012] (Court of First Chamber, 14 June 2012).

In *Bankers Insurance Co Ltd v South* ⁸⁴⁹ mentioned earlier, the remedy under the UTCCR1999 to the unfair condition precedent which requires the assured to give notice to the insurer if any circumstances which might lead to a claim occur, is that it will not be binding. However, such a remedy is not suitable, as insurers will not be able to know about the circumstances surrounding the loss, or to investigate them to determine liability. That led Mr. Justice Buckley to solve the situation in a wrong way which is more like amending the UTCCR1999, by removing the condition precedent part in the clause and leaving the notice requirement on the assureds, which if they did not comply with, could face the refusal of the claim.⁸⁵⁰ Hence, the assureds will still be required to notify the insurers about any circumstances which may lead to a loss. The past solution in *Bankers Insurance* is not legitimate according to the ECJ case *Banco Español de Crédito SA v Camino* ⁸⁵¹ which ruled that national courts cannot remove the unfair part of the term and leave the rest, as this will weaken the position of the Unfair Terms in Consumer Contracts Directive in discouraging such terms. Additionally, the *Banco* ⁸⁵² case did raise some concerns towards the FCA approach in requiring the insurers to modify the unfair term.⁸⁵³ The Directive does not give an official approval for the result of the negotiations between FCA and the insurer, even though it provides an outline for such negotiation.⁸⁵⁴ The insurers will of course prefer to amend the

⁸⁴⁹ [2003] EWHC 380 (QB), [2004] Lloyd's Rep IR 1.

⁸⁵⁰ *Bankers Insurance Co Ltd v South* [2003] EWHC 380 (QB), [2004] Lloyd's Rep IR 1 [29]-[41] (Buckley J).

⁸⁵¹ Case C-618/10 *Banco Español de Crédito SA v Camino* [2012] (Court of First Chamber, 14 June 2012).

⁸⁵² *Ibid.*

⁸⁵³ R. Merkin, 'Unfair Terms in Insurance Contracts' (2012) *Insurance Law Journal*, 23(3) 272, 283-284 .

⁸⁵⁴ *Ibid.*

term rather than be faced with the possibility of voiding important clauses, whether core or ancillary.⁸⁵⁵

Based on the above mentioned, it can be stated that the UTCCR1999 application to insurance has its problems deriving from problems in the UTCCR1999 itself.⁸⁵⁶ Additionally, it has little impact on insurance contracts,⁸⁵⁷ as English Insurance law still mainly relies on common law,⁸⁵⁸ except what is viewed by the FOS in consumer and small business cases, but even there the UTCCR1999 does not have much application.⁸⁵⁹

⁸⁵⁵ Ibid.

⁸⁵⁶ R. Merkin, 'Unfair Terms in Insurance Contracts' (2012) Insurance Law Journal, 23(3) 272, 284-285; In the context of extending the UTCCR1999 cover to microbusinesses, most responses whether with or against the extension viewed that the UTCCR1999 approach to fairness was uncertain: See The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: Micro-Businesses, Should Micro-Businesses be Treated Like Consumers for the Purposes of Pre-Contractual Information and Unfair Terms?* (Issue Paper 5, 2009) para 4.13-4.14.

⁸⁵⁷ Ibid.

⁸⁵⁸ *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep IR 253; *Direct Line Insurance Plc v Fox* [2009] EWHC 386 (QB), [2010] Lloyd's Rep IR 324 ; *Direct Line Insurance v Khan Plc* [2001] EWCA Civ 1794, [2002] Lloyd's Rep IR 364 .

⁸⁵⁹ See J. Summer, *Insurance Law and the Financial Ombudsman Service* (Informa, 2010) para 5.69; The FOS is not bound by applying strict law and applies what it considers *fair and reasonable*: See the FCA handbook, Dispute Resolution: Complaints (DISP) 3.6.1. Also adjudicators are not trained on a legal basis; there is no consistency in the decisions, and precedents are not followed: See R. Merkin, 'Unfair Terms in Insurance Contracts' (2012) Insurance Law Journal, 23(3) 272, 284; W. Merricks, 'The Jurisprudence of the Ombudsman' (Conference on Insurance Contract Law: Winds of Change, Cambridge, 6 April 2001). The FOS stated in the context of extending the UTCCR1999 protection to microbusinesses that "*We do not apply these Regulations to those commercial policyholders who presently fall within our jurisdiction...*"; See The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: Micro-Businesses, Should Micro-Businesses be*

One problem is the differentiation between ancillary and core terms which is not evident as ambiguity in the terms removes the need to consider such differentiation.⁸⁶⁰ Another problem is the effect of the existence of the unfair term which is not suitable to be applied on insurance contracts.⁸⁶¹ The judicial solutions applied in *Bankers Insurance*⁸⁶² to make the remedies more suitable were not right considering the Unfair Terms in Consumer Contracts Directive, while in *Parker*⁸⁶³ a different path was taken to escape from the remedies by ruling that there is no room for the application of the UTCCR1999, if there are solutions under insurance law and regulations.⁸⁶⁴ Even the FCA requirement to firms to undertake to amend the unfair term is seen as not right considering the Directive.⁸⁶⁵ Also the Law Commissions' paper on warranties does not support the view that the UTCCR1999 can protect assureds from unfairness in warranties, and stresses that the law on warranties should still be reformed.⁸⁶⁶

treated like Consumers for the Purposes of Pre-Contractual Information and Unfair Terms? (Issue Paper 5, 2009) para 4.12.

⁸⁶⁰ See above.

⁸⁶¹ Ibid.

⁸⁶² *Bankers Insurance Co v South* [2003] EWHC 380 (QB), [2004] Lloyd's Rep IR 1 .

⁸⁶³ *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep IR 253.

⁸⁶⁴ See above.

⁸⁶⁵ Case C-618/10 *Banco Español de Crédito SA v Camino* [2012] (Court of First Chamber, 14 June 2012) .

⁸⁶⁶ The Law Commission and Scottish Law Commission: *Insurance Contract Law: The Business Insured's Duty of Disclosure and the Law of Warranties: Joint Consultation* (Law Com CP No 204, Scot Law Com DP No 155, 2012) para 12.71.

4.2.2 Other Types Of Contracts And Good Faith

In English general contract law, as mentioned earlier, it was observed that the term good faith is not alien at all to British lawyers.⁸⁶⁷ Adding to insurance contracts which are contracts of utmost good faith,⁸⁶⁸ there are several types of contracts which impose onerous duties on the parties which happen to respond to the problems of 'unfairness' with ad hoc solutions, even though they may not be considered contracts of utmost good faith in the strict sense.⁸⁶⁹

Examples include family arrangements where all material facts known to the parties must be fully disclosed,⁸⁷⁰ contracts consisting of fiduciary relationships where the trusted party has an obligation of full disclosure to the other party who puts trust in him.⁸⁷¹

⁸⁶⁷ See above under 4.2.

⁸⁶⁸ Ibid; MIA1906, s 17; *Carter v Boehm* (1766) 3 Burr 1905.

⁸⁶⁹ See below for details.

⁸⁷⁰ Non-disclosure can set aside the contract; *Gordon v Gordon* (1816-19) 3 Swans 400; *Jenkins v Livesey (formerly Jenkins)* [1985] AC 424; It is not clear from the case law if these contracts are considered contracts of utmost good faith; See J. Chitty, *Chitty on Contracts: General Principles*, vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-163.

⁸⁷¹ Those relationships rely on trust between the parties and parties cannot bargain at “arm’s length”: See E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 218. Examples include relationship between the principle and the agent (*Armstrong v Jackson* [1917] 2 KB 822), partners (*Conlon v Simms* [2006] EWCA Civ 1749, [2008] 1 WLR 484 [128]) promoters of the company and the company (*Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721). For the relationship between subscribers subscribing depending on the prospectus or prospective investors and promoters of the company, there are also many statutory provisions requiring extensive disclosure (FSMA2000, ss 80, 87A, 87B as amended by the Prospectus Regulations 2005, SI 2005/1433, reg 2(1), sch1; FSMA2000, s 90A as amended by the Liability of Issuers Regulations 2010, SI 2010/1192; Companies Act 1985, ss 56-67, 66-69; Prevention of Fraud (Investment) Act 1985; Protection of Depositors Act 1963). It must be noted that taking advantage of this trust and confidence given by one of the

There are also some contracts which may give a limited duty of disclosure such as: sale of land contracts which may imply a duty on the vendor to disclose unusual latent defects of title,⁸⁷² surety ship contracts which burden the creditor with an obligation to disclose unusual facts regarding the surety which it is not usually expected by the surety,⁸⁷³ and general releases where one of the parties can set aside the release if the other party knew about the existence of a claim or a possible claim that he is ignorant of.⁸⁷⁴

parties to the other, or exercising illegitimate pressure or wrongdoing, can cause what is called ‘undue influence’. Undue influence can be presumed or actual, but in the presumed type there must be a relationship of trust and confidence, e.g. solicitor and client, and there must be a need in the transaction for explanation by one of the parties to the other. In any case, this form of exploitation is not accepted in English law and courts try to consider every case based on its individual circumstances (*Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773); See J. Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (The Contract Law Library, 3rd edn, Sweet and Maxwell 2012) paras 17-20-17-27, 17-32-17-33.

⁸⁷² Where a prudent buyer cannot reasonably be expected to discover them; Those contracts are not classified as contracts of utmost good faith and there is no general duty of disclosure of all material facts: See *Safehaven Investments Ltd v Springbok Ltd* (1996) 71 P & CR 59 [66]; See G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) para 9-145.

⁸⁷³ *National Provincial Bank of England Ltd v Glanusk* [1913] 3 KB 335 [338]; Those contracts are sometimes classified as contracts of utmost good faith (*Railton v Matthews* (1844) 10 CI & F 934), but a more preferable classification is that they are not (*Davies v London & Provincial Marine Ins Co* (1878) 8 Ch D 469 [475]); However, if an employer guarantees the honesty of his employee in a fidelity bond, the duty of disclosure owed seems to be greater in the sense that any act which is dishonest must be disclosed even after the bond has been executed (*LGOC Ltd v Holloway* [1912] 2 KB 72); See G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) para 9-144.

⁸⁷⁴ *Bank of Credit and Commerce International SA (In Liquidation) v Ali (No 1)* [2001] UKHL 8, [2002] 1 AC 251.

4.3 THE DUTY OF GOOD FAITH IN ISLAMIC GENERAL CONTRACT LAW

4.3.1 General Theory of Contract Law In *Sharia*'a?

Sharia'a law recognises a number of basic or nominate contracts which include sale, pledge, guarantee, agency, hire, partnership, limited partnership and gift.⁸⁷⁵ Each contract has special principles corresponding to its nature, but also contains general principles which can be applied to other contracts.⁸⁷⁶ Contracts not mentioned in the list are considered exceptions. However, what is interesting is that these exceptions frequently prevail over the general norms.⁸⁷⁷ Thus, some authors refer to Islamic contract law as law of contracts instead of law of contract.⁸⁷⁸ To apply the general principles extracted from the basic contracts listed, jurists

⁸⁷⁵ The list varies between different jurists; some recognise only four basic types: sale, gift, hire and loan. Other non-basic contracts may include deposit or mortgage; See S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 100-102; N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Tortman 1984) 19-31.

⁸⁷⁶ *Hanbali* school has a liberal position towards forming new contracts other than this list of contracts; A. El-Hassan 'Freedom of Contract, The Doctrine of Frustration, and Sanctity of Contract in Sudan Law and Islamic Law' (1985) 1 (1) ALQ 51, 54.

⁸⁷⁷ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 91-93; N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Tortman 1984) 26-31.

⁸⁷⁸ N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham & Tortman 1984) 17, 27-31; J. Schacht, *An Introduction to Islamic Law* (OUP 1983) 144; S. Mahmasani, 'Transactions in the *Sharia*'a' in M. Khadduri and H. Liebesny (eds) *Law in the Middle East* (Middle East Institute 1955) 185; N. Foster, 'Islamic Commercial Law (II): An Overview. Some Principles and Rules' (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October

used analogy (*Qiyas*) to the existing system of nominated contracts as a way for its development and application to different contracts.⁸⁷⁹ However, the consensus of the jurists “*ijma’a*” is the most decisive authority for the validity of the exceptions.⁸⁸⁰ Therefore, Islamic law was described as ‘paradigmatic’,

*“made up of individual solutions, handed down from day to day in relation to the specific need of the moment, rather than of general principles set forth a priori from which the appropriate inference will be drawn for each fresh situation.”*⁸⁸¹

In this way, stating that there is no explicit general theory of contract in Islamic law might be true to a certain extent.⁸⁸² Most literature concerning Islamic contract law is based on the contract of sale, yet general principles can be extracted to apply to a wide variety of

2009; See S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 86- 93.

⁸⁷⁹ N. Coulson, *Commercial Law in the Gulf states : The Islamic Legal Tradition* (Graham and Tortman 1984) 26-31; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 74, 91.

⁸⁸⁰ Ibid.

⁸⁸¹ L. Milliot, ‘La Pensée Juridique de l’ Islam’ (1954) 6 (3) *Revue Internationale de Droit Comparé* 441; See also S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 100.

⁸⁸² N. Foster, ‘Islamic Commercial Law (II): An Overview. Some Principles and Rules’ (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 86- 93.

contracts.⁸⁸³ These principles are of importance as they illustrate the principle of good faith and fair dealings in Islamic law.

4.3.2 General Principles Of Islamic Contract Law: Good Faith Illustrated

The primary principle which can be discerned in Islamic contract law is the obedience to the religious teachings of Islam and its moral standards, something to be contrasted with Western laws with Christian settings.⁸⁸⁴ Moreover, the need for equity and equality in the contract is required in Islamic law.⁸⁸⁵ This is evident from the *Quranic* verse:

*“God doth command you to render back your trusts to those to whom they are due; and when ye judge between man and man that ye judge with justice.”*⁸⁸⁶

And the Prophet (P.U.H.) tradition:

*“There shall be no unfair loss nor the causing of such loss (la darar wa la dirar)”*⁸⁸⁷

⁸⁸³ Ibid ; N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Tortman 1984) 26-31; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 100-102.

⁸⁸⁴ N. Foster, ‘Islamic Commercial Law (II): An Overview. Some Principles and Rules’ (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009; N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Tortman 1984) 26-31; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 100-102.

⁸⁸⁵ Ibid.

⁸⁸⁶ *Quran, Surrat Alma’ida*, verse 58.

⁸⁸⁷ Y. Alnawwai, *Matn Alraba’on Alnaoaiyah* (Dar Aloloom llnashr 1989) 43, *Hadith* 32; M. Islam, ‘Dissolution of Contract in Islamic Law’ (1998) 13 (4) ALQ 336, 340.

Other theories in Islamic contract law flow as a consequence of these primary principles which include: the need for equilibrium between parties in bargaining powers, the judicial discretion for adjusting contractual obligations, the need for certainty in contract formation (the prohibition of *gharar* and *riba*), and the system of options. These principles will be discussed as follows:

I Equilibrium

From the Islamic perspective, the contract must be equally balanced to ensure fair bargain between the parties.⁸⁸⁸ The balance monitored is between the bargaining powers of the parties and the counter values of the contract.⁸⁸⁹ Conversely, English common law does not recognise disproportion in bargaining powers, even though there have been failed attempts to do so.⁸⁹⁰

II Judicial Discretion

Contracts in Islamic law are not completely free from limits. One of the limits imposed on the contract is the limit of fairness.⁸⁹¹ Therefore, the judge in Islamic law has the capacity to

⁸⁸⁸ N. Foster, 'Islamic Commercial Law (II): An Overview. Some Principles and Rules' (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009.

⁸⁸⁹ Ibid.

⁸⁹⁰ Ibid, See *Lloyds Bank Ltd v Bundy* [1975] QB 326; *Pao On v Lau Yiu Long* [1980] AC 614, PC [634]–[635] and *National Westminster Bank plc v Morgan* [1985] AC 686 [707]–[708].

⁸⁹¹ N. Foster, 'Islamic Commercial Law (II): An Overview. Some Principles and Rules' (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009.

adjust the contractual obligations if he observes any imbalance in the contract.⁸⁹² Even though this judicial power may result in less certainty, it is more protective and fair for the parties.⁸⁹³ Such adjustment of contractual obligations provides a degree of uncertainty and protection which is not evidenced in the same way and degree of necessity in English law, which is more influenced by notions of certainty than fairness.⁸⁹⁴ Judicial discretion in Islamic law can be observed in the notion of “*ghubn*” which is the inequality in the considerations between parties.⁸⁹⁵ According to the *Hanbali* teaching, the parties can be protected by judicial discretion, if there is significant *ghubn* in the contract with no need for fraud.⁸⁹⁶

III Need For Certainty In Contract Formation

In Islamic law, the risk must be reduced to the minimum, therefore all the information regarding the circumstances of the transaction must be revealed to the parties, e.g. full

⁸⁹² Ibid; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 93.

⁸⁹³ Ibid.

⁸⁹⁴ Ibid.

⁸⁹⁵ Ibid; M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 240-243.

⁸⁹⁶ *Hanbalis* allow that in certain cases, namely: *najash*, *istirsal* sale, and *talgee alrukban* (See below under 4.5.2 for the explanation of such examples). The suffering party has also the option to rescind the contract (see below under 4.5.2); N. Foster, ‘Islamic Commercial Law (II): An Overview. Some Principles and Rules’ (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009; M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 240-243.

description of the object sold.⁸⁹⁷ This principle has resulted in the prohibition of *gharar* and *riba* as elements containing risks in the transaction.⁸⁹⁸ On the other hand, English common law requires only minimal certainty when forming the transaction, while civil law systems can be somewhere in the middle regarding their requirements.⁸⁹⁹

IV The Options System: Preventive Measure Against Infringing Good Faith

While English law views that intervention with the freedom of the contract must be kept to the absolute minimum to protect the autonomy of the will, Islamic law protects the same will by placing moral limits on the freedom of the contract.⁹⁰⁰ Islamic jurists have gone beyond the *Quranic* and *Sunnah* injunctions of *gharar* and *riba* and developed a system of ‘options’ that addresses problems related to the efficiency and the formation of the contract.⁹⁰¹

Options may be ‘expressed’ operating by the will of one of the parties such as the option of stipulation, and the option of designation. They may also be ‘automatic’, operating by law

⁸⁹⁷ N. Foster, ‘Islamic Commercial Law (II): An Overview. Some Principles and Rules’ (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 43-64.

⁸⁹⁸ See Ch 2 for more information on *gharar* and *riba*.

⁸⁹⁹ N. Foster, ‘Islamic Commercial Law (II): An Overview. Some Principles and Rules’ (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009.

⁹⁰⁰ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 65-67.

⁹⁰¹ Ibid.

such as the option of defect and the option of inspection.⁹⁰² Options protect consent from error, lesion or harm and reflect the care of Islam for parties to negotiate in a perfect environment and conditions.⁹⁰³ As a result of these unique protective measures of options in Islamic law, defects of consent which include fraud (misrepresentation)⁹⁰⁴ and mistake do not have the same weight of importance in Islamic law as they do in Western laws.⁹⁰⁵ Western laws use subjective measures to remedy the defects of consent and consider the psychological harm to the will to nullify the act in question.⁹⁰⁶ On the other hand, Islamic law uses more objective measures to deal with the disproportion in benefits, annulling the obligation, and failing to respect the conditions of the contract by using the system of options.⁹⁰⁷ The effect of such options is that the contract will be voidable and not be binding for the person who has the benefit of the options. The contract will be binding after his confirmation, or it will be as if it never existed if he annuls it.⁹⁰⁸ In other words, the act involving an option will be valid, but this validity will be subject to confirmation by the party who has the benefit of the option. The main options will be dealt with as follows:

⁹⁰² Ibid.

⁹⁰³ Ibid.

⁹⁰⁴ Fraud and misrepresentation stand for the same meaning in Islamic law as there is no recognition for negligent and innocent misrepresentations; See below under 4.5.1 for more details.

⁹⁰⁵ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 65-67.

⁹⁰⁶ Ibid.

⁹⁰⁷ Ibid; Except in investigating violence or duress, as it uses psychological measures.

⁹⁰⁸ Ibid.

A. Expressed Options⁹⁰⁹

- **Option Of Stipulation (*Kiyar Alsharat*)**

The option is admitted by all Islamic schools of law and it can be defined as a clause by one or both parties giving rights within a fixed delay, to annul or confirm the contract.⁹¹⁰ The length of the delay allowed is different between schools of Islamic law.⁹¹¹ The option can be during the contract or just afterwards.⁹¹² Its basis includes: the Prophet's *Hadith*,⁹¹³ avoiding hasty decisions, offering full information, and providing greater equity to the unwise party who regrets entering the contract after viewing its unfairness or lesion.⁹¹⁴ The act will be valid, but suspended until the option is taken by the party who has its benefit, where he can

⁹⁰⁹ The option of designation (*kiyar Alta'aen*) will not be discussed here since it is not admitted by the *Hanbali* school of Islamic law.

⁹¹⁰ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 67-68; M. Salamh , *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 354-355.

⁹¹¹ Ibid.

⁹¹² N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 67.

⁹¹³ “The prophet said to Habban Alansari, who complained of being wronged in buying and selling, if you sell or if you buy, declare without any mistake at the moment of the sale, ‘I reserve the option of three days’.”; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 70; M. Alshokani, *Naeel Alawtar* (1st edn, Dar Alhadith 1993) 218, *Hadith* 2232.

⁹¹⁴ N. Obeid N, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 72.

confirm the contract or avoid it where it will be as if it has never existed.⁹¹⁵ If the delay passed without any expression from the party with the option, it will be regarded as confirmed.⁹¹⁶ The *Hanbalis* also admit the option of session which allows the parties to rescind from a formed contract while still in the session of the contract.⁹¹⁷

B. Legal Options⁹¹⁸

- **Option Of Defect (*Kiyar Alayiab*)**

This is a facility for the buyer in a sale contract or any person who has possession of a property by a compensatory transaction to cancel the contract after discovering that the object

⁹¹⁵ Specifically, the act will be suspended for the party who has the benefit of the option, and binding for the other. This option is similar to the suspensive condition in Western laws, and it can be without justification of the decision; however, it must not support any fortuitous incident or the act will be void because of *gharar*, and the right of confirmation will be lost. Also, this option must depend on the will of the party who makes the stipulation, not on the existence of the condition (N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 68-73.

⁹¹⁶ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996)68; M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 354-355.

⁹¹⁷ It is also recognised by *Shafais* but not *Malikis* and *Hanafis*; Y. Alnawwai, *Sahih Muslim With Alnawwi Explanation* (Kitab Aleiman, Dar Alsalaam 1996) 134-136, *Hadith* 1531; M. Alshokani, *Naeel Alawtar* (1st edn, Dar Alhadith 1993) 219-224, *Hadith* 2234-2236; N. Saleh (2001) 'Freedom of Contract: What Does it Mean in the Context of Arab Laws?' 16 (4) ALQ 346, 348; N. Foster, 'Islamic Commercial Law (II): An Overview. Some Principles and Rules' (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009.

⁹¹⁸ The author will limit the discussion to the main two options, as there several options.

of the contract suffers some defect which reduces its value.⁹¹⁹ According to the *Hanbali* school of law, the defect is to be judged by reference to the custom of the region where the parties concluded the contract.⁹²⁰ Besides the general basis of options, the option of defect is based on several *Hadiths*:

“A Muslim is not allowed to sell his brother anything with a defect unless he points it out to him.”⁹²¹

“He who deceives us is not one of ours.”⁹²²

The main aim of the option is to remedy the ignorance of defects on part of the contracting parties and balance the benefits.⁹²³ Jurists have tried to widely interpret the *Hadiths* to

⁹¹⁹ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 80–85 ; M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 359-366; Unlike the option of stipulation, the option of defect does not work as a suspensive condition; however, like other options it works in a similar way to the condition of avoidance; See S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 327-331.

⁹²⁰ Ibid; *Hanafis* consider the defect as anything which reduces the value of the goods by reference to commercial usage, *Shafais* consider it anything which reduces the value of the goods and prevents the legal goals that the buyer intended, *Malikis* differentiate between minor and major defects, and only allow an option to rescind for major defects, while a reduction in price only is allowed for minor defects. The custom of the region where the contract is concluded is also considered here.

⁹²¹ M. Alquzoini, *Sunn Ibn Majah* (Kitab Altijarat, Almaktabah Alimiah 1999) 755, *Hadith* 2246; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 82.

⁹²² Y. Alnawwai, *Sahih Muslim With Alnawwi Explanation* (Kitab Aleiman, Dar Alsalaam 1996) 282, *Hadith* 101; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 82.

broaden the application of the option of defect.⁹²⁴ To exercise that option some conditions must be satisfied, namely: the defect must be anterior to the sale, still exist when claiming cancellation, not be known to the buyer when taking possession, and not be subject to an exclusion clause.⁹²⁵ However, *Hanbalis* do not allow clauses that exclude future defects because of the risk element and the imbalance that they may cause.⁹²⁶

If the buyer chooses to cancel the contract, he must return the object of the contract, and a restitution of the price must be given to him, but with no indemnity for any of the parties.⁹²⁷ If the buyer confirms the contract, the contract becomes binding on him⁹²⁸ and according to the *Hanbalis*, as against other schools, he is entitled to get an indemnity (*Arsh Alayiab*) equal to the difference in the price of an object in perfect condition and one with a defect.⁹²⁹

⁹²³ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 80-85; M. Salamh, *Nathreet Alagd Fe Alfiah Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamiyah 1994) 359-366.

⁹²⁴ Ibid.

⁹²⁵ Ibid; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 331-335.

⁹²⁶ Ibid.

⁹²⁷ Ibid; *Hanafis* differentiate between cases where the defect is found before or after the possession and require agreement with the seller or a judge intervention only if it was found after possession. However, *Hanbalis* and *Shafais* do not provide such distinction or these requirements.

⁹²⁸ Ibid; Confirmation can be expressed or tacit.

⁹²⁹ Ibid; See also A. Almaqdasi, *Alsharah Alkabeer ala Almqnia'a Bihamsh Almugni* (Maktabt Almoay'ad 1994) 86.

- **Option Of Inspection (*Kiyar Alrua'yah*)**

This option can be defined as the right of the person contracting on something not seen (absent from the contractual session “*majlis alaqd*”) when concluding the contract to confirm or cancel the contract after inspecting the object.⁹³⁰ To have this option, the object of the contract must be designated, and could not be seen at the time of the contract.⁹³¹ The main aim of the option is to remove ignorance regarding the object of the contract which may cause disputes between parties.⁹³² In principle, selling an object which is not seen violates the certainty required by Islamic law; however, exceptions to this general principle are present, including when it is difficult to see the object at the contractual session or when it is absent from it.⁹³³

Schools differ regarding this option. *Shafais* rejected it, *Malikis* admitted it only as a conventional option, *Hanafis* accepted it as a legal option, and *Hanbalis* took a moderate

⁹³⁰ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 86-93; M. Salamh, *Nathreet Alagd Fe Alfih Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 357-358; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 343.

⁹³¹ M. Salamh, *Nathreet Alagd Fe Alfih Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 357-358.

⁹³² N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 86-93.

⁹³³ Ibid; M. Salamh, *Nathreet Alagd Fe Alfih Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 357-358.

view.⁹³⁴ *Hanbalis* allowed the sale of an absent object only if it was well described and seen by parties a short time previously.⁹³⁵ If the object does not conform with the descriptions that means the stipulations of the contract are not respected, and the buyer can cancel the contract.⁹³⁶ Thus, it seems that the option of inspection in *Hanbali* teaching is not evident, which made modern authors state that technically it does not exist.⁹³⁷

⁹³⁴ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 343-345; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 86-89.

⁹³⁵ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 344-345; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 88; M. Shalabi, *Almadkhal Fe Alfikr Alislame* (10th edn, Dar Aljama'iyat 1985) 618.

⁹³⁶ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 344-345; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 88; A. Alsunhori, *Masadir Alhaqq Fe Alfikh Alislame: Drisah Muqarinh blifiqh Algarbi*, vol 4 (Ma'ahd Alderasat Alarbiah Alaliah 1967) 242.

⁹³⁷ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 345; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 88; A. Alsunhori, *Masadir Alhaqq Fe Alfikh Alislame: Drisah Muqarinh blifiqh Algarbi*, vol 4 (Ma'ahd Alderasat Alarbiah Alaliah 1967) 242; M. Shalabi, *Almadkhal Fe Alfikr Alislame* (10th edn, Dar Aljama'iyat 1985) 618.

4.3.3 Quranic Verses And Hadiths Encouraging Good Faith

It must be remembered that one of main objectives of *Sharia'a* is to monitor fairness in all aspects of people's daily life, and to ensure that they are away from deceitful attitudes.⁹³⁸ God (Allah) commands:

*"Allah commands justice, the doing of goods and liberality to kith and kin, and he forbids all shameful deeds and injustice and rebellion. He instructs you that you may receive admonition."*⁹³⁹

Moreover, *Sharia'a* encourages that commercial transactions are concluded on the basis of cohesion and brotherhood from both parties. Therefore, parties must perform them in uprightness and keep away from immoralities.⁹⁴⁰ Allah commands:

*"Help you one another in righteousness and piety, but help you not one another in sin and rancour, fear Allah: for Allah is strict in punishment."*⁹⁴¹

Sharia'a principles also require that humans conclude trade and commercial contracts in mutual good consent.⁹⁴² Allah commands:

⁹³⁸ M. Billah, 'Regulatory Framework of Doctrine of "Utmost Good Faith" In Takaful (Islamic Insurance)' <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>> accessed 19 October 2009.

⁹³⁹ Quran, Surrat Alnahal, verse 90.

⁹⁴⁰ M. Billah, 'Regulatory Framework of Doctrine of "Utmost Good Faith" In Takaful (Islamic Insurance)' <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>> accessed 19 October 2009; See also S. Mohammad, 'Islamic insurance (Takaful): Concept and Practice' in *Encyclopaedia of Islamic Banking and Insurance* (Institute of Islamic Banking and Insurance 1995) 197, 199.

⁹⁴¹ Quran, Surrat Alma'ida, verse 2.

*“O’ you who believe eat not up your property among yourselves in vanities, but let there be amongst you traffic and trade by mutual good will.”*⁹⁴³

This is also clear from the *Hadith* of the Prophet (P.U.H.):

*“It is unlawful to possess the property of a Muslim without his expressed consent.”*⁹⁴⁴

Islamic teaching allows all practices which go along with *Sharia’a* objectives, but forbids practices which undermine its goals.⁹⁴⁵ These detrimental practices include fraud, cheating and exorbitant profit which creates unfairness to one of the parties to the degree that it violates good faith in the contract.⁹⁴⁶ This is evident from the following:

⁹⁴² See M. Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>>.accessed 19 October 2009; N. Abdullah, ‘Good Faith and Fair Dealings in Hire Purchase Contract in Malaysia’. <<http://www.docstoc.com/docs/20244904/GOOD-FAITH-AND-FAIR-DEALING-IN-HIRE-PURCHASE-CONTRACT>> accessed 26 November 2009.

⁹⁴³ *Quran, Surrat Alnisa’a*, verse 29.

⁹⁴⁴ A. Albaihaqi, *Alsunan Alkubra* (Kitab Alaryia’h, Dar Alkutb Alilmiyah 2003) 160, *Hadith* 10668; N. Abdullah, ‘Good Faith and Fair Dealings in Hire Purchase Contract in Malaysia’. <<http://www.docstoc.com/docs/20244904/GOOD-FAITH-AND-FAIR-DEALING-IN-HIRE-PURCHASE-CONTRACT>>accessed 26 November 2009.

⁹⁴⁵ See N. Abdullah, ‘Good Faith and Fair Dealings in Hire Purchase Contract in Malaysia’. <<http://www.docstoc.com/docs/20244904/GOOD-FAITH-AND-FAIR-DEALING-IN-HIRE-PURCHASE-CONTRACT>> accessed 26 November 2009.

⁹⁴⁶ *Ibid.*

*“And defraud not people of their things, and commit not corruption in the earth.”*⁹⁴⁷

*“Give full measure and be not of those who cause others to lose.”*⁹⁴⁸

*“And weight with an equal balance.”*⁹⁴⁹

*“Narrated by ‘Abdullah bin ‘Umar: A person came to the Prophet and told him that he was always betrayed in purchasing. The Prophet told him to say at the time of buying, no cheating.”*⁹⁵⁰

The Prophet (P.U.H.) also promoted the concept of good faith when he linked the honesty of the transaction with the blessing from Allah.⁹⁵¹ This honesty implies that the buyer and the seller explain all the facts, whether good or bad pertaining to the sold object.⁹⁵²

“Narrated by Hakim bin Hizam (r.a). Allah’s Messenger said: the seller and the buyer have the right to keep or return the goods so long as they have not parted or till they part and if both the parties spoke the truth and described the defects and qualities (of the goods) then

⁹⁴⁷ Quran, *Surrat Alshura’a*, verse 183.

⁹⁴⁸ Ibid, verse 181.

⁹⁴⁹ Quran, *Surrat Alshura’a*, verse 182.

⁹⁵⁰ M. Albukari, *Sahih Al-Bukhari* (Kitab Albyoa’a, Dar Ibn Katheer 1993) 745, *Hadith* 2011; M. Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>>.accessed 19 October 2009.

⁹⁵¹ M. Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>>.accessed 19 October 2009.

⁹⁵² Ibid.

they would be blessed in this transaction, and if they told lies or hid something then the blessings of their transaction would be lost.”⁹⁵³

Moreover, the Prophet explained the punishment of those traders who are fraudulent and infringe the standards of good faith.⁹⁵⁴

*“Obaid bin Rafia from his father reported that the Prophet said: the merchants will be gathered on the Resurrection day as transgressors except those who were fearful of Allah, pious and truthful.”*⁹⁵⁵

On the other hand, he declared positive consequences for those decent upright traders abiding to moral dealings principles⁹⁵⁶:

⁹⁵³ M. Albukari, *Sahih al-Bukhari* (Kitab Albyoa’a, Dar Ibn Katheer 1993) 732, *Hadith* 1976; M. Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>> accessed 19 October 2009.

⁹⁵⁴ M. Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>>.accessed 19 October 2009.

⁹⁵⁵ A. Alsmargandi, *Sunn Aldarmi* (Kitab Albyoa’a, Dar Alkitab Alrabi 1987) 322, *Hadith* 2538; K. Maulana (Trans), *Mishkatul Masabih, Kitab al-Buyu* (Lahore 1997) 269, *Hadith* 6; M. Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>> accessed 19 October 2009.

⁹⁵⁶ Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>>accessed 19 October 2009.

*“Abu Sayed (r.a.) reported that the Messenger of Allah (s.w.t.) said: the truthful trustworthy merchant will be with the Prophets, truthful and martyrs.”*⁹⁵⁷

Based on the aforementioned Islamic general contract principles, together with the *Quranic* verses and Prophet traditions encouraging good faith, one can conclude that good faith in Islamic contract law is present in every aspect of any transaction.⁹⁵⁸ It must be borne in mind that Western laws aspire to economic efficiency and certainty, which justifies an ‘explicit’ concept of good faith to ensure that those objectives do not affect fairness.⁹⁵⁹ On the other hand, Islamic law aspires to the religious principles of Islam, which imply fair dealing, morality and good faith in every aspect of the transaction and at all times, and therefore economic efficiency must be viewed within this moral framework.⁹⁶⁰ Consequently, although there is no enunciated concept of the term ‘good faith’ in Islamic law as in Western laws, this does not mean that it is absent.⁹⁶¹ Instead fair dealings, honesty, and trust, are inherent in all

⁹⁵⁷ M. Altirmithi, *Sunn Altirmithi* (Kitab Albyoa’a, Dar Alkutb Alilmiah) 515, *Hadith* 1209; K. Maulana (Trans), *Mishkatul Masabih, Kitab al-Buyu* (Lahore 1997) 269, *Hadith* 4; M. Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>> accessed 19 October 2009.

⁹⁵⁸ M. Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>> accessed 19 October 2009.

⁹⁵⁹ N. Foster, ‘Islamic Commercial Law (II): An Overview. Some Principles and Rules’ (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009.

⁹⁶⁰ Ibid; See above under 4.3.3.

⁹⁶¹ Ibid

Islamic teachings, and without these fundamental principles, the contract will be flawed from the Islamic perspective.⁹⁶² Hence, it is the different basis of the systems and their perception and value of good faith which shape the difference of its presentation. In fact the presentation of good faith in Islamic law in the way explained indicates to us two important results which wholly contradict the argument of absence. Firstly, it is clear that the Islamic perception of good faith, even implicit, is wide and to be applied to different aspects of the transaction. In contrast, Western laws' perception is more limited in nature, even explicit. Secondly, Western laws' concept of good faith is rather vague and not unified.⁹⁶³ Islamic law principles illustrating good faith are well defined and clearly explained. The disparities between Islamic schools of law are among details, not substance.

In any way, the inherent notion of good faith in Islamic law must not be viewed as similar to its absence in English law since the two systems have totally different aspirations, principles and priorities. It must be remembered that unlike Islamic law, which is a religiously based law, English law is a secular law. Therefore, in contrast with Islamic law, English law, just as other Western laws, values certainty as a method leading to economic efficiency, more than moralities, which can be remotely linked to religion.⁹⁶⁴ This harsh approach was softened by developing a concept of good faith which helps to apply justice to a certain extent in civil law

⁹⁶² A. Hassan, *Sales and Commercial Contracts in Early Islamic Commercial Law* (The Other Press Sdn Bhd 2007) 26-28.

⁹⁶³ See above under 4.2; It must be noted that the EU member states do not have a uniform meaning for good faith (*Director General of Fair Trading v First National Bank* [2001] UKHL 52; [2002] 1 AC 481 [17] (Bingham L); E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014) 489-490).

⁹⁶⁴ N. Foster, 'Islamic Commercial Law (II): An Overview. Some Principles and Rules' (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009.

countries.⁹⁶⁵ Nevertheless, English law did not counterbalance this ‘harsh’ certainty by adopting this concept.⁹⁶⁶ Accordingly, we can say that in English general contract law a general duty of good faith is absent, but in Islamic law it is implicit in its teachings and never absent. It may be argued that English law has doctrines to deal with bad faith and consequently contains an implicit concept of good faith.⁹⁶⁷ However, this argument can be refuted, since these doctrines are only remedying acting in bad faith, and do not contain positive steps or encouragement for acting in good faith even implicitly.⁹⁶⁸ Even the foundations of implying a general duty of good faith in some type of contracts may be established after the *Yam seng* case; however, its application is still limited to certain types of contracts and not general.⁹⁶⁹ With the general absence of the duty except possibly in limited type of contracts and the ‘negative’ approach combined, one can wonder if there is a general duty of good faith in English general contract law. Conversely, in Islamic law the implicit notion of good faith is positive rather than negative, general rather than limited, and primary protective rather than remedial.

⁹⁶⁵ Ibid.

⁹⁶⁶ Ibid.

⁹⁶⁷ M. Clarke, ‘The Common Law of Contract in 1993: Is there a General Doctrine of Good Faith?’(1993) 23 HKLJ 318, 323.

⁹⁶⁸ R. Brownsword, *Contract Law: Themes for the Twenty First Century* (2nd edn, OUP 2006) 120–121; See also M. Clarke, ‘The Common Law of Contract in 1993: Is there a General Doctrine of Good Faith?’(1993) 23 HKLJ 318, 340; E. McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, OUP 2014)499-501; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

⁹⁶⁹ See above under 4.2; Also, good faith is demanded in insurance contracts which are contracts of utmost good faith; MIA1906, s17.

4.4 MISREPRESENTATION AND NON-DISCLOSURE IN ENGLISH

GENERAL CONTRACT LAW

Misrepresentation in English law can be defined as “*an unambiguous, false statement of fact or law which is addressed to the other party misled, which is material (although this requirement is debatable) and which induces the contract*”.⁹⁷⁰

Hence, for actionable misrepresentation, the statement must be false,⁹⁷¹ unambiguous,⁹⁷² and it must be traditionally a statement of fact as opposed to statements of opinion and intention.⁹⁷³ However, now false statements of law are also capable of constituting actionable misrepresentation.⁹⁷⁴ In certain circumstances statements of opinion and intention can give cases of actionable misrepresentation.⁹⁷⁵

⁹⁷⁰ E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 227.

⁹⁷¹ For the meaning of false see: *Avon Insurance v Swire Fraser Ltd* [2000] 1 All ER (Comm) 573 [15]-[17] (Rix J), where the measure in the MIA1906, s 20(4) has been adopted. The MIA1906, s 20(4) provides that “*A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.*”

⁹⁷² Vague puffs cannot constitute actionable misrepresentation: See *Dimmock v Hallett* (1866) LR 2 Ch App 21.

⁹⁷³ It must be noted that false statements of opinion and false statements of intention do not usually give a case of actionable misrepresentations: See *Bisset v Wilkinson* [1927] AC 177 for opinion; *Wales v Wadham* [1977] 1 WLR199 for intention.

⁹⁷⁴ Unless they are mere opinions with no reasonable justifications: See *Pankhania v London Borough of Hackney* [2002] EWHC 2441, [2004] 1 EGLR 135. This differs from the traditional view which rules that false statements of law do not give a case of effective misrepresentation (*Beattie v Lord Ebury* (1872) LR 7 Ch App 777), and distinct between false statements of fact and false statements of law which is not easy (*Solle v Butcher* [1950] 1 KB 671).

Moreover, the misrepresentation must be done by one of the parties to the other,⁹⁷⁶ or by his agent,⁹⁷⁷ or at least with his knowledge of the misrepresentation⁹⁷⁸ to incur rescission.⁹⁷⁹ Nonetheless, if only damages are demanded and not rescission, they can be available to the injured party even if the misrepresentation was not made by one of the parties, or by his agent

⁹⁷⁵ The distinction between these statements is not very clear; Statements of opinion can give a case of effective misrepresentation in some situations which include: if the representor was in a situation which gave him knowledge of the facts (*The Smith v Land & House Property Corp* (1884) 28 Ch D 7); if the representor has reasonable justifications for the opinion which creates an implied representation (*Brown v Raphael* [1958] Ch 636); if the representor did not hold or could not honestly hold the opinion given the facts known to him (*Connolly Ltd v Bellway Homes Ltd* [2007] EWHC 895; [2007] All ER (D) 182 (Apr)). If the representor was an expert, his statement of opinion can amount to a statement of fact; however, in tort the distinction between statements of fact and predication is less important (*Esso Petroleum Ltd v Mardon* [1976] QB 801). Statements of intention can give a case of effective misrepresentation and situations include: if the representor did not honestly hold the intention to carry out what he intended in the statement or knew that he was not able to carry it out (*Edgington v Fitzmaurice* (1885) 29 Ch D 459); On the other hand, a statement of fact can be one of opinion if it is construed as such considering the reasonable comprehension of the recipient and the context of the statement (*Kyle Bay Ltd (trading as Astons Nightclub) v Underwriters subscribing under policy 019057/08/01* [2006] EWHC 607 (Comm)).

⁹⁷⁶ *Hasan v Wilson* [1977] 1 Lloyd's Rep 431.

⁹⁷⁷ *UBAF Ltd v European American Banking Corporation* [1984] QB 713.

⁹⁷⁸ *Barclays Bank plc v O'Brien* [1994] 1 AC 180.

⁹⁷⁹ See R. Stone, *The modern Law of Contract* (10th edn, Routledge 2013) 279; However, in some cases rescission can be sought where the third party is put "into enquiry" in respect of the circumstances surrounding the conclusion of the contract (*Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773 [44]; G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) para 9-014)

or with his knowledge.⁹⁸⁰ Adding to that, the misrepresentation must be addressed to the other party misled in a direct or indirect manner.⁹⁸¹

An element of intention is said to be required where the misrepresenter must have the intention that the misrepresentee will act upon the misrepresentation to incur relief.⁹⁸² Such requirement seems to be right if intention will mean that the misrepresentation is addressed to: the misrepresentees or their agents, or a category of people where the misrepresentees are part of,⁹⁸³ or those who the misrepresenter intended or expected that the misrepresentation will be passed on to them and relied upon.⁹⁸⁴ However, if it means that the misrepresenter can claim that he did not have the intention that the misrepresentee will act

⁹⁸⁰ Liability in damage here can be in tort for fraudulent misrepresentation and for negligent misrepresentation (*Foote v Hayne* (1824) 1 C & P 545; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465), or based on a collateral contract between the misrepresenter and the misrepresentee (*Wells (Merstham) Ltd v Buckland Sand and Silica Ltd* [1965] 2 QB 170); See R. Stone, *The modern Law of Contract* (10th edn, Routledge 2013) 279; See J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-025 ; See below for more about the general remedies for different types of misrepresentations.

⁹⁸¹ That includes cases where the misrepresenter addresses the misrepresentation to a third party intending that it will be forwarded to the misrepresentee: See *Commercial Banking Co (Sydney) Ltd v R H Brown & Co* [1972] 126 CLR 337.

⁹⁸² J. Cartwright, *Misrepresentation, Mistake and Non-disclosure* (The Contract Law Library, 3rd edn, Sweet and Maxwell 2012) para 5-19.

⁹⁸³ *Peek v Gurney* (1873) L R 6 HL 377; However, the judgment in the case regarding the position of the statements in the prospectus is no longer the law after the FSMA 2000, s 90.

⁹⁸⁴ *Pilmore v Hood* (1838) 5 Bing (NC) 97; *Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 QB 621.

upon the misrepresentation or not in the way he did, that can raise some doubt as the situation is not very clear.⁹⁸⁵

A statement can be given verbally or in writing, and can even be by conduct.⁹⁸⁶ The yardstick here is that there is a positive step, and therefore generally mere silence does not constitute a misrepresentation.⁹⁸⁷ Furthermore, the statement must have induced the actual claimant to enter the contract,⁹⁸⁸ and it may have to be material meaning that it affects the state of mind of a reasonable person in his decision whether to enter the contract or not or whether to enter

⁹⁸⁵ Any requirement of intention seem to present in fraud cases (*Abu Dhabi Investment Company Ltd v H Clarkson & Co* [2008] EWCA Civ 699 [33]; *Goose v Wilson Sandford & Co (No 2)* [2001] Lloyd's Rep PN189 [48]) and for claiming damages under the Misrepresentation Act 1967 (*Banque Keyser Ullmann SA v Skandia (UK) Insurance Co* [1990] QB 665 [790]), where in negligent misrepresentation in tort only reasonable foreseeability is required (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465). Even in fraud it is not clear if it is sufficient for incurring rescission to show that the misrepresentee is entitled to rely on the misrepresentation or that the misrepresentor is supposed to have known that the misrepresentee may rely on it (*Cullen v Thomson* (1862) 6 LT 870; *Tackey v McBain* [1912] AC 186 PC), where it is sufficient in non-fraudulent misrepresentation. Nonetheless, it seem to be that the approach of courts is not lenient towards fraud (*Ross River Limited v Cambridge City Football Club Limited* [2007] EWHC 2115 (Ch), [2008] 1 All ER 1004) and the meaning of intention above will not be applied unless the representee's reliance is really unforeseeable; See J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-033, 6-034.

⁹⁸⁶ The meaning of statement is not literal: See *Gordon v Selico Ltd* (1986) 18 HLR 219.

⁹⁸⁷ *Smith v Hughes* (1871) LR 6 QB 597; See below for more about this point.

⁹⁸⁸ *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) [163]-[173]; When claiming misrepresentation, the consideration is to what the representee would have done had the representation not been made (whether he will enter the contract or not), not to what he would have done if the statement was true: See *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) [174]-[191].

it on the same terms;⁹⁸⁹ however, the requirement of materiality is not strict.⁹⁹⁰ The materiality will affect the burden of proof, as if the statement was material the burden of proof will be on the person who made the statement in proving that the other party did not rely on the representation when entering the contract.⁹⁹¹ Nonetheless, if it was not material, the burden will be on the recipient to prove that it did in fact influence his decision to enter the contract.⁹⁹²

In respect of inducement, it means any impact or influence of the statement in the mind of the actual representee, which played a “*real and substantial*” role in entering the contract, where if there was no such representation, the representee would not have entered into the

⁹⁸⁹ See *Mathias v Yetts* (1882) 46 LT 497 [502].

⁹⁹⁰ G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) para 9-109; However, materiality makes it easier to satisfy the court that the representee was induced by the misrepresentation to enter the contract as there can be a presumption of inducement (*Barton v County Natwest Ltd* [2002] 4 All ER 494). It also can justify that mere puffs do not incur a remedy (*Dimmock v Hallett* (1866) LR 2 Ch App 21). If materiality is not satisfied and the representee was actually induced and entered into the contract, the representee may still claim rescission (*Museprime Properties Ltd v Adhill Properties Ltd* (1991) 61 P & CR 111 [124]) and the absence of materiality will only affect the burden of proof which will be on the representee not the representor. There is no evident authority where the representee claims inducement by immaterial facts and the court refuses a remedy for that reason; See J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-040; For debate over the requirement of materiality: See E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 230, where it was argued that materiality may not be important as the representation of facts which are immaterial will not usually induce the representee to enter the contract.

⁹⁹¹ *Museprime Properties Ltd v Adhill Properties Ltd* (1991) 61 P & CR 111 [124].

⁹⁹² *Dadourian Group International Inc v Simms* [2009] EWCA Civ 169; [2009] 1 Lloyd’s Rep 601 [99]-[101].

contract or at least on the same terms.⁹⁹³ If the misrepresentation was not discovered by the claimant,⁹⁹⁴ corrected before any reliance upon it,⁹⁹⁵ or the reliance was upon his own inquiries,⁹⁹⁶ there is no case of inducement.⁹⁹⁷ On the other hand, there will still be an inducement if the representee had the chance to discover the truth of the statements but did not.⁹⁹⁸ The statement does not need to be the only inducement to the contract as being one of the inducements inducing the representee to enter the contract suffices.⁹⁹⁹

⁹⁹³ See *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm) [150]-[170]; see also *JEB Fasteners v Marks, Bloom and Co* [1983] 1 All ER 583, where the representation did not have a “*real and substantial*” role on the representees in entering contract.

⁹⁹⁴ *Horsfall v Thomas* (1862) 1 H & C 90.

⁹⁹⁵ *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511.

⁹⁹⁶ *Atwood v Small* (1838) 6 CI & F 232.

⁹⁹⁷ It must be noted that inducement in the definition above is not needed to claim rescission for fraudulent misrepresentation as any material impact or influence on the thinking of the representee will suffice; however, it is needed to claim damages caused by fraud: See *Edgington v Fitzmaurice* (1885) 29 Ch D 459 [483]; *Barings Plc (In Liquidation) v Coopers & Lybrand (No5)* [2002] EWHC 461 (Ch); [2002] 2 BCLC 410 [127]-[130]; *Ross River Limited v Cambridge City Football Club Limited* [2007] EWHC 2115 (Ch); [2008] 1 All ER 1004 [202].

⁹⁹⁸ The principle was applied on a frequent basis in fraud (*Gordon v Selico Ltd* (1986) 278 EG 53 [61]); It was also applied for innocent misrepresentation in *Redgrave v Hurd* (1881) 20 Ch D 1 (it was reasonable for representees to act in that way); However, it was not applicable where there was a document signed representing the true position by the representee: See *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511; The principle in *Redgrave* maybe changed after *Smith v Eric S Bush* [1990] 1 AC 831, where the House of Lords indicated in the context of negligent misrepresentation that if missing the chance to discover the truth was not reasonable, for example because of the high value of the house or because it was a commercial property, the situation could have been different. Nonetheless, the position

A misrepresentation can be fraudulent, negligent or innocent and remedies will vary accordingly.¹⁰⁰⁰ A fraudulent misrepresentation can arise when the representor makes a statement which is false with his knowledge that it is false, or his belief that it is false, or with recklessness in the sense that there is a lack of care whether the statement is true or false.¹⁰⁰¹ It must be noted that the mental element of fraud must be proved to assert fraudulent misrepresentation which may be hard to prove.¹⁰⁰² The remedies available for fraudulent

is not clear for innocent misrepresentation where mostly *Redgrave* will still apply; See G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) para 9-20 ; It was argued that the principle in *Redgrave* shall persist for rescission, while the principle in *Smith* shall be limited to damages against a third party: See J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-039; The reasonableness of reliance on the representation to enter the contract is not needed for fraudulent misrepresentation to claim rescission (*Goff v Gauthier* (1991) 62 P & CR 388); however, the situation is not clear for innocent or negligent misrepresentation (See the above discussion in this footnote); See discussion in J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-40-6-41.

⁹⁹⁹ *Edgington v Fitzmaurice* (1885) 29 Ch D 459 [481] (Cotton L J); It is worth mentioning that materiality is concerned with the reasonable person, where inducement is concerned with the actual representee; If the statement is material there is no inference of law that the representee was induced to the contract (*The Smith v Land & House Property Corp* (1884) 28 Ch D 7 [16]), although there can be inference of fact (*Smith v Chadwick* (1884) 9 App Cas 187 [196]) especially in fraudulent misrepresentation (*Ross River Limited v Cambridge City Football Club Limited* [2007] EWHC 2115 (Ch); [2008] 1 All ER 1004 [241] (Briggs J)); See G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) para 9-026; See J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-039.

¹⁰⁰⁰ See below for details of every type and remedy.

¹⁰⁰¹ *Derry v Peek* (1889) 14 App Cas 337 [360]-[380] (Herschell L).

¹⁰⁰² *Ibid*; it must be noted that in this case it was held that the defendants/directors cannot be sued for fraud as they honestly believed that the statement in the prospectus was true. In other words, the mental element of fraud or dishonesty was absent. However, it could have been considered negligent misrepresentation, but there was

misrepresentation are: rescission with the possibility of claiming indemnity,¹⁰⁰³ and damages for the tort of deceit, which includes all direct results of the fraudulent misrepresentation, even not foreseeable.¹⁰⁰⁴ Damages may include the costs of the lost chances¹⁰⁰⁵ and the damages for distress¹⁰⁰⁶ and aggravated damages from suffering psychologically or physically.¹⁰⁰⁷ Damages aim to bring the injured party back to the situation that he would be in if the representation was not made, not if it was true.¹⁰⁰⁸ That seems to be the financial situation he was in before entering the contract, depending on the presumption that he would not enter the contract if such misrepresentation had not been made.¹⁰⁰⁹ Following the discovery of the misrepresentation and having the chance to stop further loss, there cannot be

no doctrine of negligent misrepresentation in tort incurring liability in damages for pure economic loss at the time, as it was introduced after *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; It must be proved that the misrepresenter has intended that false statement will be relied upon by the misrepresentee (*Abu Dhabi Investment Company Ltd v H Clarkson & Co* [2008] EWCA Civ 699 [33]) even though he may not have bad motives behind that (*Polhill v Walter* (1832) 3 B & Ad 114). Knowledge of the false statement, but not realising its significance does not in itself constitute fraud (*Angus v Clifford* [1891] 2 Ch 449).

¹⁰⁰³ Rescission can be limited in certain events; See the discussion below for details of rescission and indemnity.

¹⁰⁰⁴ *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd* [1996] 3 WLR 1051.

¹⁰⁰⁵ See *East v Maurer* [1990] EWCA Civ 6, where damages for loss of profits are provided.

¹⁰⁰⁶ *McNally v Welltrade International Ltd* [1978] IRLR 497.

¹⁰⁰⁷ *Archer v Brown* [1985] QB 401; Also it must be noted that the door may be open for awarding punitive damages for the tort of deceit: See *Kuddus (AP) v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29.

¹⁰⁰⁸ *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158.

¹⁰⁰⁹ *Eso Petroleum Co Ltd v Mardon* [1976] EWCA Civ 4.

a claim for damages anymore.¹⁰¹⁰ The burden of proof of fraudulent misrepresentation will be on the party asserting fraud.¹⁰¹¹

Another type of misrepresentation is the negligent misrepresentation which occurs when the false statement is believed to be true; however, there are no reasonable justifications for such belief, or when it is made carelessly breaching the duty to take reasonable care for the accuracy of the representation owed by the representor to the representee.¹⁰¹² Negligent misrepresentation can be claimed in tort and under the Misrepresentation Act 1967.¹⁰¹³

The doctrine of negligent misrepresentation in tort and the existence of a duty of care not arising from a contractual relationship¹⁰¹⁴ or a fiduciary relationship¹⁰¹⁵ was not recognised until *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.¹⁰¹⁶ This case established liability in damages for negligent misrepresentation in tort resulting in pure economic loss, and formed the notion of “*assumption of responsibility*”. This liability allows one of the parties to recover in the form of damages from the other, even without a contract, if the other party has

¹⁰¹⁰ *Downs v Chappell* [1996] 3 All ER 344.

¹⁰¹¹ The burden of proof is not an easy one: See *Dadourian Group International Inc v Simms* [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep 601 [31]-[32]; It must be noted that contributory negligence cannot be raised as a claim against fraudulent misrepresentation, and the Law Reform (Contributory Negligence) Act 1945, s1(1) does not apply : See: *Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2003] 1 All ER 173.

¹⁰¹² See J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-72 ; Misrepresentation Act 1967, s 2 (1).

¹⁰¹³ See below for the details of every claim.

¹⁰¹⁴ *Derry v Peek* (1889) 14 Ap Cas 337.

¹⁰¹⁵ *Nocton v Ashburton* [1914] AC 932.

¹⁰¹⁶ [1964] AC 465.

made a negligent misrepresentation to the other which is relied upon, resulting in a pure economic loss. It was held that there is a duty of care owed in special kinds of relationships where there is “proximity”, even if they are not contractual relationships or fiduciary duties. These include relationships where it is clear that the person seeking the advice has reasonably relied on the information provided, having trust in the other party to provide a certain level of care regarding the advice, and when the advisor has knowledge that the party seeking the advice will reasonably rely on it or should have had such knowledge.¹⁰¹⁷ Lord Morris has raised another consideration to take into account which is expertise, meaning that the advisor is an expert or has a skill incurring such duty of care.¹⁰¹⁸ Another consideration to bear in mind is if there are any rewards given by the advice seeker, even though it is not a condition.¹⁰¹⁹ Authorities took two approaches to determine the existence of such “special relationship” between the parties. The first approach applied a test of three conditions which must be satisfied for the “special relationship” to exist : the representee’s reliance on the advice must be reasonably foreseeable by the representor, the “proximity” between the parties, imposing the liability by the law must be fair and reasonable.¹⁰²⁰ The second approach depends on the question of “assumption of responsibility” by asking the defendant if he assumed responsibility for what he stated to the claimant or if he was regarded by law as

¹⁰¹⁷ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 [486] (Reid L).

¹⁰¹⁸ *Ibid* [494]-[504] (Morris L).

¹⁰¹⁹ *Ibid* [528]-[529] (Devlin L).

¹⁰²⁰ *Smith v Eric S Bush* [1990] 1 AC 831 [865] ; it must be noted that reasonable foreseeable reliance on the statement even important is not enough, as it must also be fair and reasonable by the law to impose liability, and therefore a careless advice arising from a social relationship does not incur liability as it is not fair and reasonable to impose it by law (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 [482] ; *Chaudhry v Prabhakar* [1989] 1 WLR 29 [34], [36]).

to have assumed responsibility.¹⁰²¹ It seems that the assumption of responsibility is enough, but not essential: where it is satisfied, that is enough, if not, the three conditions in the first approach are considered.¹⁰²² Those tests aside, it was thought that the most important factors are the circumstances of the case and the relationship between the parties,¹⁰²³ including the goals of the representations, and the interference of a liability in negligence with the contract between the parties.¹⁰²⁴

Before such a decision it was not possible to recover damages from pure economic loss caused by negligent misrepresentation unless there was a contractual relationship or a fiduciary duty between the parties.¹⁰²⁵ After *Hedley Byrne*,¹⁰²⁶ there was an extension to the

¹⁰²¹ *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 AC 181 [4] (Bingham L); [35] (Hoffmann L). The test is objective as it does not rely on the defendant's intentions but on the reasonable deduction of his conduct considering the case circumstances and background.

¹⁰²² *Ibid.*

¹⁰²³ *Precis (521) v William Mercer Ltd* [2005] EWCA Civ 114, [2004] PNL 28.

¹⁰²⁴ *Smith v Eric S Bush* [1990] 1 AC 831.

¹⁰²⁵ See *Candler v Crane Christmas & Co* [1951] 2 KB 164 where recovery in tort from negligent misrepresentation resulting in pure economic loss was rejected; See also *Donoghue v Stevenson* [1932] AC 562; See *Nocton v Ashburton* [1914] AC 932 for negligent misrepresentation in fiduciary duties; See *Derry v Peek* (1889) 14 App Cas 337 [347] (Bramwell L) where it was stated that "To found an action for damages there must be a contract and breach" or "fraud".

¹⁰²⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

doctrine to include pre-contractual or commercial relationships.¹⁰²⁷ Also, courts tried to determine the *Hedley Byrne* scope in subsequent cases and some principles can be highlighted.¹⁰²⁸ Firstly, the knowledge of the representor: the more knowledge the representor has regarding the representee and his goals in reliance on the statement will result in a higher possibility that liability will be incurred.¹⁰²⁹ Secondly, the goals behind making the statement: where there is an intention by the representor that the representee will rely on the statement, liability will be more likely to incur,¹⁰³⁰ while it would probably not if the statement was not addressed to a particular person.¹⁰³¹ Thirdly, the reasonableness of reliance: if reliance was reasonable, it will be more likely that liability will be imposed,¹⁰³² while it probably would not be if the reliance was not reasonable.¹⁰³³ The damages here will be measured according to the tort of negligence, which includes only reasonable foreseeable losses.¹⁰³⁴

¹⁰²⁷ *Esso Petroleum Co Ltd v Mardon* [1976] EWCA Civ 4 ; It must be noted that in commercial relationships if the parties depend on their own skill or if the representor reasonably assume that the representee will have advice from his own experts, a duty of care in common law will not incur (*Oleificio Zucchi SA v Northern Sales Ltd* [1965] 2 Lloyd's Rep 496 [519]).

¹⁰²⁸ Those principles are discussed in E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 223.

¹⁰²⁹ *Caparo v Dickman* [1990] 2 AC 605; *Smith v Eric S Bush* [1990] 1 AC 831.

¹⁰³⁰ *Smith v Eric S Bush* [1990] 1 AC 831.

¹⁰³¹ *Caparo v Dickman* [1990] 2 AC 605.

¹⁰³² *Smith v Eric S Bush* [1990] 1 AC 831.

¹⁰³³ *Chaudhry v Prabhakar* [1989] 1 WLR 29.

¹⁰³⁴ *Esso Petroleum Co Ltd v Mardon* [1976] EWCA Civ 4.

In addition to tort, negligent misrepresentation can be raised under section 2(1) of the Misrepresentation Act 1967. To incur liability under the 1967 Act, there must be a misrepresentation which induced the other party to enter the contract.¹⁰³⁵ The burden of proof then will be reversed as it will be upon the representor to prove that he made the representation believing that it is true with reasonable justifications for it to be true until the contract is formed.¹⁰³⁶ The remedies available are: rescission which may be barred under section 2 (2) of the Misrepresentation Act 1967 at the discretion of the court to provide damages *in lieu of rescission*, with the possibility of claiming indemnity.¹⁰³⁷ Also remedies include damages under section 2(1) of the Misrepresentation Act 1967, however, unlike the common law liability; damages here will be measured as provided in tort for deceit.¹⁰³⁸

It is worth mentioning that negligent misrepresentation can be also raised under some Acts containing specific provisions incurring liability, e.g. section 397 of the FSMA2000¹⁰³⁹

¹⁰³⁵ Misrepresentation Act 1967, s 2(1); The section is concerned with the other party in the contract not the agent of the other party (*Resoulte Maritime Inc v Nippon Kaiji Kyokai (The Skopas)* [1983] 1 WLR 857).

¹⁰³⁶ Ibid; *Cooper v Tamms* [1988] 1 EGLR 257; However, sometimes it can be hard to prove: See *Howard Marine v Ogden* [1978] QB 574; See J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-080.

¹⁰³⁷ See below for more details about rescission.

¹⁰³⁸ *Royscott Trust Ltd v Rogerson* [1991] 3 WLR 57; It must be noted that the Law Reform (Contributory Negligence) Act 1945 where the representee has contributed to the loss by his fault seems not to be raised in negligent misrepresentation unless there is liability under the Misrepresentation Act 1967, s 2 (1) and in tort at the same time, and damages in that situation may be reduced: See *Gran Gelato v Richcliff Ltd* [1992] CH 560.

¹⁰³⁹ Also Property Misdescriptions Act 1991, ss 1, 4, 1(4); The Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288, reg 4.

The main advantages of the statutory liability over the tortious liability for negligent misrepresentation are: firstly, liability in tort requires proving the “special relationship” between the parties which justifies exercising a duty of care which can be difficult to prove,¹⁰⁴⁰ while that is avoided in the statutory liability. Secondly, while the burden of proof in the tortious liability is on the representee, it is reversed in the statutory liability as it will be upon the representor to prove that he made the representation believing that it is true with reasonable justifications until the contract is formed.¹⁰⁴¹ Here only the representor’s belief will be taken into account, as the belief of the agent will not be sufficient.¹⁰⁴² Thirdly, damages are decided based on the tort of deceit in the statutory liability¹⁰⁴³ which includes all direct losses from the misrepresentation, even those unforeseeable,¹⁰⁴⁴ while it will be based on the tort of negligence in the tortious liability which includes only foreseeable losses.¹⁰⁴⁵

As for innocent misrepresentation, it occurs when the party who makes the representation believes that the false statement made is true based on reasonable justifications, in other

¹⁰⁴⁰ *Gosling v Anderson* [1972] EGD 709.

¹⁰⁴¹ Misrepresentation Act 1967, s 2(1).

¹⁰⁴² *MCI World Com International Inc v Primus Telecommunications Inc* [2003] EWHC 2182 (Comm), [2004] 1 All ER (Comm) 138.

¹⁰⁴³ *Roycott Trust Ltd v Rogerson* [1991] 3 WLR 57.

¹⁰⁴⁴ See above for more details about this point.

¹⁰⁴⁵ *Esso Petroleum Co Ltd v Mardon* [1976] EWCA Civ 4; However, some of the advantages of the tortious liability in negligent misrepresentation can include that: it is not necessary to prove that the misrepresentation led to a contract; it can apply to all statements even opinions; it can apply even if the representation was from a third party; it applies even if the contract was void *ab initio*: See E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 236.

words, it is neither fraudulent nor negligent.¹⁰⁴⁶ The remedies available will be either rescission with possible indemnity,¹⁰⁴⁷ or damages *in lieu of rescission* under section 2(2) of the Misrepresentation Act 1967 at the discretion of the court.¹⁰⁴⁸ It must be noted that there is no right for the claimant to claim damages for innocent misrepresentation under the 1967 Act as in negligent misrepresentation, as damages are only provided in *lieu of rescission*, at the discretion of the court and not as a right.¹⁰⁴⁹ It seems that the authority of the court to provide damages is available only if the right of rescission is still available at the time of the court's order, and therefore if the right to rescind the contract has been lost, damages cannot be awarded.¹⁰⁵⁰ The measure of damages awarded by the court is not clear. However, it may be inferred from section 2(3) of the Misrepresentation Act 1967 that the amount of damages is lower than damages for negligent misrepresentation under section 2(1), since it provides that assessment of damages under section 2(2) must take into account the damages awarded under section 2(1). Section 2(3) of the Misrepresentation Act 1967 also confirms that damages

¹⁰⁴⁶ Misrepresentation Act 1967, s 2(1); E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 236.

¹⁰⁴⁷ Rescission can be limited in certain events; See below for details about rescission and indemnity.

¹⁰⁴⁸ See below for more details; See *William Sindall plc v Cambridgeshire CC* [1994] 1 WLR 1016 [1036] (Hoffmann LJ).

¹⁰⁴⁹ Misrepresentation Act 1967, s 2(1); E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 240.

¹⁰⁵⁰ See *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333; *Floods of Queensferry Ltd and another v Shand Construction Ltd and others* [2000] BLR 81; The view in *Thomas Witter Ltd v TBP Industries* [1996] 2 All ER 573 stating that damages can be still awarded if the right to rescind was lost, was not supported by the authorities and it is not consistent with the reading of the Misrepresentation Act 1967 s 2 (2); See E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 242.

under section 2(2) can be awarded solely or combined with damages under section 2(1), meaning that they can be awarded whether there is negligent misrepresentation or not.¹⁰⁵¹

In respect of the remedy of rescission, as seen earlier it can be claimed for all types of misrepresentation,¹⁰⁵² and the contract will be voidable, not void for the benefit of the innocent party.¹⁰⁵³ Rescission has a retrospective and prospective effect as it restores the parties to the same position they were in before entering the contract,¹⁰⁵⁴ but the party who chooses to rescind must notify the other unless it is impossible to communicate.¹⁰⁵⁵

¹⁰⁵¹ It seems that damages under s 2(2) of the Misrepresentation Act 1967 will be measured based on tort not contract, considering that damages under s 2(1) of the Misrepresentation Act 1967 are measured based on tort. However, special measures for measuring damages can be defended for consequential loss: See *Davis & Co (Wines) Ltd v Afa-Minerva (EMI) Ltd* [1974] 2 Lloyd's Rep 27; *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 [1044] (Evans L J), and for bad bargains: See *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 [1045] (Evans L J), [1037] (Hoffmann LJ).

¹⁰⁵² Before the Misrepresentation Act 1967, rescission for innocent misrepresentation was not allowed if the misrepresentation turned out to be a term in the contract or if the contract was performed. That was changed and rescission became allowed in those events according to the Misrepresentation Act 1967, s 1.

¹⁰⁵³ E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 237.

¹⁰⁵⁴ In this context, the rescission meant is the “rescission for misrepresentation”, not “rescission for breach”. The rescission for breaching the contract has only a prospective effect not a retrospective effect as well as in rescission for misrepresentation. Also, in rescission for breach claiming damages is possible for the breach of contract since it is still in existence, while in rescission for misrepresentation, the misrepresentee who rescinds the contract will lose the right for damages *prima facie* since there will be no contract in existence, but under the Misrepresentation Act 1967, s 2(2) the court has the discretion to provide damages *in lieu* of rescission: See E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 237; G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) para 9-079 ; 9-082.

¹⁰⁵⁵ The notice can be in the form of beginning legal proceedings (*Phillips v Brooks Ltd* [1919] 2 KB 243); Also reasonable steps revealing the intention of rescission can be sufficient especially in fraudulent misrepresentation

This right to rescind can be lost in certain circumstances, namely: after affirming the contract following discovering the misrepresentation and knowledge of the right to rescind,¹⁰⁵⁶ lapse of time except in fraud and breaching a fiduciary duty,¹⁰⁵⁷ acquiring the goods by a third

where the misrepresenter may not be contacted (*Car & Universal Finance Co Ltd v Caldwell* [1964] 2 WLR 600).

¹⁰⁵⁶ *Long v Lloyds* [1958] 1 WLR 753; Affirmation can be expressed or by conduct which may be a passive conduct (not asserting avoidance or not returning permuims): See *Argo Systems FZE v Liberty Insurance (PTE)* [2011] EWHC 30; [2011] EWCA Civ 1572; It can be also deduced from failing to rescind (*First National Reinsurance Co Ltd v Greenfield* [1921] 2 KB 260). The party must know about his right to rescind the contract, if not that is not considered affirmation: See *Peyman v Lanjani* [1985] Ch 457. The misrepresentee is not denied from his right to damages under the Misrepresentation Act 1967, s 2(1) after affirmation even those damages may be limited (*Production Technology Consultants v Bartlett* [1986] 1 EGLR 82), however, affirmation may should bar damages equal to the benefit received from avoidance (*Argo Systems FZE v Liberty Insurance (PTE)* [2011] EWHC 30; [2011] EWCA Civ 1572).

¹⁰⁵⁷ Lapse of time can be considered only a proof of affirmation where there is knowledge of the truth (*Clough v LNW Ry* (1871) LR 7 EX 26 [35]) However, where there is ignorance of the truth and therefore of the right to rescind, lapse of time cannot be considered as a proof of affirmation (*Armstrong v Jackson* [1917] 2 KB 822). The time usually will be calculated from the discovery of the truth (*Gillett v Peppercorne* (1840) 3 Beav 78). However, in *Leaf v International Galleries* [1950] 2 KB 86, lapse of time as a bar to the right to rescind was supported for an innocent misrepresentation even though the claimant just discovered the truth before the proceedings and hence it cannot be a proof of affirmation, but this decision was because of the operation of the Sale of Goods Act 1979. It is not clear if mere lapse of time will also bar rescission for other instances of complete innocent misrepresentation. Nonetheless, in fraud and the breach of fiduciary obligation, mere lapse of time cannot bar rescission as it can be only a proof of affirmation (*Clough v LNW Ry* (1871) LR 7 EX 26 [35]); See J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-132).

party,¹⁰⁵⁸ the impossibility of the retroactive effect,¹⁰⁵⁹ or exercising discretion by the court under section 2(2) of the Misrepresentation Act 1967 to grant damages *in lieu* of rescission to the claimant.¹⁰⁶⁰ The court can have the discretion to refuse rescission and provide for damages if it views that it is more suitable and just to do so, in consideration of the nature of the misrepresentation and the losses in case of maintaining the contract, and the losses to the other party in case of rescission.¹⁰⁶¹ This latter bar on rescission is provided only for negligent and innocent misrepresentations.¹⁰⁶²

In the event of rescission, indemnity can also be provided which indemnifies the expenses paid by the misrepresentee in order to comply with the contract, and which is distinct from damages.¹⁰⁶³ Any exclusion of liability for the misrepresentation or its remedies must be reasonable, and that reasonableness will be determined according to section 11 of the UCTA1977.¹⁰⁶⁴ If the exclusion is not reasonable, it will have no effect.¹⁰⁶⁵

¹⁰⁵⁸ *Phillips v Brooks Ltd* [1919] 2 KB 243; The action of the third party must be in good faith, with consideration, and before the claim for rescission: See E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 238; See also the Sale of Goods Act 1979, s 23.

¹⁰⁵⁹ *Vigers v Pike* (1842) 8 Cl & F 562; *Clarke v Dickson* (1858) EB & E 148 [154] (Crompton J); Rescission will still be available if most of the restoration can be offered as it does not need to be exact; therefore rescission will still be available even there is a decline in the property value or its state (*Armstrong v Jackson* [1917] 2 KB 822).

¹⁰⁶⁰ See also E. McKendrick, *Contract Law: Texts, Cases and Materials* (6th edn, OUP 2014)615.

¹⁰⁶¹ Misrepresentation Act 1967, s 2 (2).

¹⁰⁶² *Ibid.*

¹⁰⁶³ See *Whittington v Seale-Hayne* (1900) 82 LT 49.

¹⁰⁶⁴ Misrepresentation Act 1967, s 3.

¹⁰⁶⁵ *Ibid.*

Regarding non-disclosure, generally speaking, English law does not recognise such duty and it requires something more than just silence for it to amount to misrepresentation.¹⁰⁶⁶ This may be inferred from the facts of the case as if there was an attempt to conceal a defect,¹⁰⁶⁷ misrepresentation by conduct,¹⁰⁶⁸ or partial non-disclosure including : statements which are true but misleading because of not disclosing all the relevant information,¹⁰⁶⁹ and literally true statements implying additional facts which are false.¹⁰⁷⁰ Other situations include failing to correct a representation which was true at the time but became false¹⁰⁷¹ Moreover, English law requires disclosure in contracts of utmost good faith such as insurance contracts.¹⁰⁷² Also,

¹⁰⁶⁶ *Keates v Cadogan* (1851) 10 CB 591; *Smith v Hughes* (1871) LR 6 QB 597; See also: The Sales of Goods Act 1979, ss 14(2) , 2(C), The Supply of Goods and Services Act 1982, The Consumer Protection Act 1987, which may make the duty of disclosure less important since they confer protective rights for the consumer.

¹⁰⁶⁷ *Schneider v Heath* (1813) 3 Camp 506.

¹⁰⁶⁸ *Re Shackelton, ex parte Whittaker* (1875) LR 10 CH App 446[449]; *Gordon v Selico* (1986) 11 HLR 219; *Spice Girls Ltd v Aprilia World Services BV* [2002] EWCA Civ 15, [2002] EMLR 27; *TMT Asia Ltd v Marine Trade SA* [2011] EWHC 1327 (Comm) ; [2011] 1 CLC 976.

¹⁰⁶⁹ *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778.

¹⁰⁷⁰ *Goldsmith v Roger* [1962] 2 Lloyd's Rep 249.

¹⁰⁷¹ *With v. O'Flangan* [1936] Ch575, (CA).

¹⁰⁷² See MIA 1906, s 17; *Carter v Boehm* (1766) 3 Burr 1905; As there is asymmetry in information between the parties in the sense that only one of the parties holds knowledge of material facts; See G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) para 9-136.

it requires it in contracts consisting of fiduciary relationships,¹⁰⁷³ contracts which can give some limited duty of disclosure,¹⁰⁷⁴ and under some statutory provisions.¹⁰⁷⁵

The general rule that there is no general duty of disclosure applies also to the tort of negligence.¹⁰⁷⁶ However, liability for non-disclosure in tort of negligence can be possible in some circumstances including where there is a “*voluntary assumption of responsibility*” for disclosing information.¹⁰⁷⁷

The remedy for non-disclosure of facts is rescission as the contract will be voidable to the benefit of the disadvantaged party.¹⁰⁷⁸ Generally there is no remedy in damages for mere or

¹⁰⁷³ *Tate v Williamson* (1886) 2 Ch App 55; Fiduciary relationships rely on trust between the parties, e.g. relationships between the trustee and the beneficiary, the lawyer and the client, and the principle and the agent. See E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 218.

¹⁰⁷⁴ Examples include surety ship contracts (*LGOC Ltd v Holloway* [1912] 2 KB 72 [81]-[83]) and sale of land (*Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 [1423]).

¹⁰⁷⁵ See FSMA2000, ss 80, 87A, 87B as amended by the Prospectus Regulations 2005, SI 2005 /1433, reg 2(1), sch1; FSMA2000, s 90A as amended by the Liability of Issuers Regulations 2010, SI 2010/1192; Also there can be a duty of disclosure: to clarify a legal relationship between the parties (*Bell v Marsh* [1903] 1 Ch 528 [541]); when performing the contract (*Sybron Corp v Rochem Ltd* [1984] Ch 112 [126]-129)); in Custom (*Jones v Bowden* (1813) 4 Taunt 847).

¹⁰⁷⁶ *Yuen Kun-Yeu v A-G of Hong Kong* [1988] AC 175.

¹⁰⁷⁷ The representee must have also relied on this assumption: See *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 [777]-[789], [790]-[805]; Other circumstances include the doctor’s negligent non-disclosure of treatment risks to a patient (*Sidaway v Bethlem Royal Hospital Governors* [1985] AC 871).

¹⁰⁷⁸ Avoidance will be *ab initio*; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 [777]-[789], [790]-[805]; J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-150.

complete non-disclosure even fraudulent.¹⁰⁷⁹ As for negligent non-disclosure, there can be an exception to this general rule in tort where there is a “*voluntary assumption of responsibility*” as it allows claiming damages.¹⁰⁸⁰ Nonetheless, in cases of partial non-disclosure, which will amount to actionable misrepresentation, even non-fraudulent non-disclosure can give the right to claim damages under section 2(1) of the Misrepresentation Act 1967.¹⁰⁸¹ Therefore, it can be stated that complete non-disclosure does not allow for damages as it is not considered actionable misrepresentation,¹⁰⁸² while partial non-disclosure can amount to actionable misrepresentation¹⁰⁸³ and accordingly can allow for damages just like misrepresentation.¹⁰⁸⁴

¹⁰⁷⁹ *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 [777]-[789], [790]-[805]; J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-150.

¹⁰⁸⁰ *Ibid* [794].

¹⁰⁸¹ Unless the other party proves that he had reasonable justifications for believing that there is no disclosure on his part; it must be noted that the Misrepresentation Act 1967 only applies to misrepresentation, not non-disclosure. However, the 1967 Act can apply to situations of partial but not complete non-disclosure as they can amount to actionable misrepresentation. Non-disclosure even in contracts of utmost good faith such as insurance does not incur liability in damages: See *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249; See J. Chitty, *Chitty on Contracts: General Principles*, Vol 1 (H. Beale ed, 31st edn, Sweet and Maxwell 2012) para 6-151.

¹⁰⁸² *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665; *Keates v Cadogan* (1851) 10 CB 591; *Smith v Hughes* (1871) LR 6 QB 597.

¹⁰⁸³ See above for examples of partial non-disclosure.

¹⁰⁸⁴ See above for damages provided for misrepresentation.

It must be noted that where the statute requires different remedies for non-disclosure, they will be applied.¹⁰⁸⁵

¹⁰⁸⁵ For example for the liability of issuing the prospectus of the company, rescission is denied and only damages are available to the injured party (*Re South of England Natural Gas* [1911] 1 Ch 573).

4.5 MISREPRESENTATION AND NON-DISCLOSURE IN ISLAMIC LAW

4.5.1 Defects Of Consent Theory: Remedial Measures Against Infringing Good Faith

In Western laws, the theory of defects of consent plays an important role in examining the will of the parties.¹⁰⁸⁶ They adopt subjective measures by questioning the psychological side of consent in all defects, including duress or violence, fraud, and mistake.¹⁰⁸⁷ Nevertheless, in Islamic law, this theory plays only a subsidiary role, as Islamic law uses more of an objective approach that does not investigate the psychological side of consent, other than in the case of violence (duress).¹⁰⁸⁸ One of the reasons for this disparity is that morality is already incorporated in Islamic contract law.¹⁰⁸⁹ Moreover, the unique system of options in Islamic law is considered the ‘main’ and ‘first’ safeguard for the will, which also considers morality and balance of benefits by insuring that the parties’ contract is in a well-informed environment.¹⁰⁹⁰ However, this objectivity in Islamic law towards the defects of consent does not stop intention (*niyaa* or *qasd*) from being a significant factor which must be assessed

¹⁰⁸⁶ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 94.

¹⁰⁸⁷ Ibid; See for example, Art 1109 of the French Civil Code.

¹⁰⁸⁸ Ibid; A. Alsunhori, *Masadir Alhaqq Fe Alfiah Alislame: Drisah Muqarinh blifiqh Algarbi*, vol2 (Ma’ahd Alderasat Alarbiah Alaliah 1967) 183-184.

¹⁰⁸⁹ Ibid.

¹⁰⁹⁰ Ibid; See above under 4.3.2.

when investigating the validity of the contract according to the *Hanbali* teaching.¹⁰⁹¹ Intention is unarguably a vital element in faith‘*ibadat*’, on the other hand, its significance in secular transaction‘*mumalat*’, is a matter of debate between Islamic schools of law.¹⁰⁹² Unlike *Hanafis* and *Shafais*, *Hanbalis* and *Malikis* consider that intention is to be assessed in secular transactions as well as matters of faith.¹⁰⁹³ *Hanbalis* do consider the intention that induces the party to enter the contract.¹⁰⁹⁴ Thus, they prohibit stigmas where licit methods are used knowingly to reach a prohibited goal, e.g. selling grapes to a person where it is suspected he will turn them into wine.¹⁰⁹⁵ However, the stringent conditions that they lay when investigating the intention bring them closer to other schools in this regard.¹⁰⁹⁶ This investigation of intention does not contradict the objectivity in Islamic law regarding the defects of consent.¹⁰⁹⁷ According to Chehatah, intention must be present for the contract to be ‘formed’ e.g. if someone made a declaration which he intended to be a joke and not to produce legal effects, there is no contract formed, whereas consent must be present for the contract to be ‘valid’ e.g. if someone were forced to enter a contract under violence or duress, the contract is formed because the intention is present; however, the contract is not valid since

¹⁰⁹¹ N. Saleh, 'The role of intention (*Niyya*) Under Saudi Arabian *Hanbali* Law' (2009) 23 (3) ALQ 347, 350-352.

¹⁰⁹² *Ibid.*

¹⁰⁹³ *Ibid.*

¹⁰⁹⁴ *Ibid.*

¹⁰⁹⁵ *Ibid.*

¹⁰⁹⁶ *Ibid.*

¹⁰⁹⁷ *Ibid.*

it is lacking consent.¹⁰⁹⁸ Chehatah adopted two apparently contradicting approaches to define consent, one describing it as a psychological phenomenon, and the other describing it as something extrinsic to the will, presumed to exist until its absence is proved by an illicit act.¹⁰⁹⁹ Those approaches are both right to a certain extent, as Islamic law does examine consent (the psychological side) only if it was manifested by objective means (illicit acts e.g. duress or violence).¹¹⁰⁰ Therefore, by adopting an objective creation, some contracts may be formed and valid, even when the intention and consent are lacking, because there is no objective proof of their absence, e.g. a contract fulfilled with a mistake present in the mind of one of the contracting parties.¹¹⁰¹ This problem in Islamic law is encountered by the distinct general principles of contract. This includes certainty when forming the contract through prohibiting *gharar* and *riba*, and providing adequate description in the exceptional cases when the subject matter is not yet in existence.¹¹⁰² Moreover, as mentioned earlier, the options system and the morality incorporated provide Islamic law with other safeguards to solve this objective approach.¹¹⁰³ Hence, it is fair to say that theories of mistake and fraud in Islamic law are not apparent and structured as they are in English law. However, they must be remedied to maintain good faith in the contract.

¹⁰⁹⁸ C. Chehatah, *Driot Musulman: Application Au Proche-oreint* (Dalloz, 1970) 131–132.

¹⁰⁹⁹ Ibid.

¹¹⁰⁰ Ibid.

¹¹⁰¹ Ibid 115.

¹¹⁰² J. Makdasi, 'An Objective Approach to Contractual Mistake in Islamic Law' (1985) 3 BU Int'l LJ 325, 337; See above under 4.3.2; See also Ch1 for more.

¹¹⁰³ See also above under 4.3.2; See also Ch 1 for more.

Generally speaking, the contract with a defect of consent will be voidable and the contracting party who suffers from the defect of consent will have a unilateral right to rescind the contract, as a general remedy (option or *kiyar*).¹¹⁰⁴ This person will bear the onus to prove that he was induced to enter the contract by certain misleading elements.¹¹⁰⁵ The defects of consent in Islamic law include fraud or misrepresentation (*tadlis*), mistake (*ghalat*), and duress or violence (*Ikrah*).¹¹⁰⁶ In the study, discussion will be confined to fraud or misrepresentation.

4.5.2 Fraud Or Misrepresentation (*Tadlis* Or *Taqhrer*)

Fraud in Islamic law does not have a neat meaning, as in other systems. It is somehow removed from the Roman system of *Dolus*¹¹⁰⁷, the English Common law of Fraud¹¹⁰⁸ and the French Civil law of *Dol*.¹¹⁰⁹ What is interesting from a common lawyer perspective is that

¹¹⁰⁴ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 175.

¹¹⁰⁵ Ibid.

¹¹⁰⁶ Ibid.

¹¹⁰⁷ See B. Nicholas, & E. Metzger, *An Introduction to Roman Law* (OUP 2008) 207; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 205.

¹¹⁰⁸ See G. Treitel, *Treitel on The Law of Contract* (Ed. Peel ed, 13th edn, Sweet & Maxwell 2011) 362-440; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 205.

¹¹⁰⁹ Alex Weill et Francois Terre, *Droit Civil: Les Obligations* (2nd edn, Precis Dalloz 1975) 196-206; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 205.

in Islamic law one will find that fraud and misrepresentation usually stands for the same meaning.¹¹¹⁰ Unlike English law, in Islamic law there is no distinction between fraudulent misrepresentations and innocent or negligent misrepresentations.¹¹¹¹ Additionally, the common law distinctions between misrepresentations inducing to enter the contract and misrepresentations as contract statements, and between the rescission for misrepresentation and the rescission for breach of contract are not evident in the same framework amongst early Islamic jurists.¹¹¹² The reason may be that Islamic jurists deal with hypothetical cases with principles applicable to any forthcoming case, while common lawyers rely on precedents, and cases which really happened.¹¹¹³

To add to the complication, the approach towards fraud or misrepresentation in Islamic law is inconsistent.¹¹¹⁴ Some authors treat it as a separate option which has its own rules under the sale contract, and authorise the defrauded to avoid the contract respectively.¹¹¹⁵ Meanwhile,

¹¹¹⁰ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 243.

¹¹¹¹ Ibid; See above under 4.4 for misrepresentation in English law.

¹¹¹² Ibid; See above under 4.4 for more about misrepresentation in English Law; See also E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 237; G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) para 9-079.

¹¹¹³ Ibid.

¹¹¹⁴ Ibid.

¹¹¹⁵ For example: Y. Bellefonds, *Traite de Droit Musulman Compare*, vol 2 (Mouton & Co 1965) 355.

other authors treat it as another option added to the options introduced in Islamic law.¹¹¹⁶ Nonetheless, most authors treat it on an ‘ad hoc’ basis.¹¹¹⁷ This inconsistent approach may be due to the foreign origin of fraud historically, with the reluctance of the traditional jurists to recognise concepts with foreign origins.¹¹¹⁸ In any event, the option of fraud, ‘*kiyar altadlis*’, must be a final resort after establishing that the other ‘preventive’ options cannot be invoked, together with the rules of mistakes.¹¹¹⁹ This can explain why fraud or misrepresentation in Islamic law is not considered extensively by jurists as most incidents will be covered under the main options system which must be exhausted before resorting to the option of fraud.¹¹²⁰

¹¹¹⁶ For example: N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Tortman 1984) 72; N. Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law* (2nd edn, Arabic and Islamic Law Series, Graham and Tortman 1992) 61.

¹¹¹⁷ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 207.

¹¹¹⁸ Ibid; See above; J. Schacht, *An introduction to Islamic Law* (OUP 1964) 9; N. Coulson, *A History of Islamic Law* (Edinburgh University Press 1964) 28.

¹¹¹⁹ N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Tortman 1984) 69-70; See above under 4.3.2 for more about the other options.

¹¹²⁰ Ibid; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 94; A. Alsunhori, *Masadir Alhaqq Fe Alfiqh Alislame: Drisah Muqarinh blifiqh Algarbi*, vol 5 (Ma’ahd Alderasat Alarbiah Alaliah 1967) 183-184; Islamic law does not deal with the defects of consent in a subjective approach like Western laws except for violence or duress. Instead it relies on a more objective approach which lies in the system of options. It also depends on incorporated morality and general contract principles, e.g. the prohibition of *gharar* and *riba* ; See above under 4.5.1.

Also the subject of fraud is mostly discussed under the sale contract and even there it is not analysed in a coherent manner unless for trust and *istirsal* sales.¹¹²¹

Regarding the effects of fraud or misrepresentation on the contract in Islamic law, generally if the contract was concluded with effective fraud, the contract will be voidable by the defrauded party.¹¹²² However, if the defrauded party ratifies the contract, he will be affirming his knowledge of the misrepresentation or fraud and will lose the right to rescind.¹¹²³ Avoidance here will have retroactive and prospective effects putting the parties in the situation they were in before the contract.¹¹²⁴ In order to prevent unjust enrichment, if the buyer elects to rescind the contract, he must return the goods (sometimes with compensation for the consumption of the goods as restitution), while the seller must return the whole price to him.¹¹²⁵

The main bases of fraud prohibition are the Prophet's *hadiths*: "*He who cheats is not one of us*"¹¹²⁶ and "*When buying, say no cheating*".¹¹²⁷

¹¹²¹ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 207; See below for the meaning of these sales.

¹¹²² Ibid 206.

¹¹²³ Ibid.

¹¹²⁴ Ibid.

¹¹²⁵ Ibid.

¹¹²⁶ Y. Alnawwai, *Sahih Muslim With Alnawwi Explanation* (Kitab Kitab Aleiman, Dar Alsalaam 1996) 282, *Hadith* 101; N. Coulson, *Commercial Law in the Gulf States : The Islamic Legal Tradition* (Graham and Tortman 1984) 69.

¹¹²⁷ Y. Alnawwai, *Sahih Muslim With Alnawwi Explanation* (Kitab Albyoa'a, Dar Alsalaam 1996) 137, *Hadith* 1533.

Islamic jurists view fraud as a “*serious moral wrong*”,¹¹²⁸ and it can be defined traditionally as: “*deliberate and deceitful causing to fall into mistake of the contracting party which persuades him to contract*”.¹¹²⁹

Hence, fraud or misrepresentation must induce the person to enter the contract and it must be deliberate, which rules out innocent or negligent misrepresentations.¹¹³⁰ The judge will have the power to determine whether the fraud was enough to induce the defrauded, by going back to the contract and to the status of the defrauded party, e.g. age, knowledge.¹¹³¹

Islamic jurists have decided that the main elements of fraud in Islamic law include using fraudulent manoeuvres or tricks to cause harm,¹¹³² and the inducement of the party to enter

¹¹²⁸ S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 204-207; N. Coulson, *Commercial Law in the Gulf States : The Islamic Legal Tradition* (Graham and Tortman 1984) 65.

¹¹²⁹ A. Alsunhori, *Masadir Alhaqq Fe Alfiqh Alislame: Drisah Muqarinh blifiqh Algarbi*, vol 2 (Ma’ahd Alderasat Alarbiah Alaliah 1967)157; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 211.

¹¹³⁰ A. Alsunhori, *Masadir Alhaqq Fe Alfiqh Alislame: Drisah Muqarinh blifiqh Algarbi*, vol 2 (Ma’ahd Alderasat Alarbiah Alaliah 1967) 159; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 211.

¹¹³¹ Ibid.

¹¹³² These include fraudulent acts, verbal statements, or omissions, e.g. failure to disclose in some contracts; See N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 104; A. Alsunhori, *Masadir Alhaqq Fe Alfiqh Alislame: Drisah Muqarinh blifiqh Algarbi*, vol 2 (Ma’ahd Alderasat Alarbiah Alaliah 1967) 150 ; S. Rayner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman, 1991) 213-216.

the contract.¹¹³³ Also, it must be done by one of the parties or someone authorised by him; however, third party fraud is considered in certain cases e.g. *najash*.¹¹³⁴

As a general remark, all jurists were concerned with removing the harm caused by fraud and balancing the consequences of the fraudulent tricks with maintaining justice between parties against any illegitimate profit, keeping in mind economic stability.¹¹³⁵ The harm here is the inequality in considerations between the parties or what is called *ghubn*, and generally to have an actionable case of fraud it must also cause *ghubn*.¹¹³⁶ The degree of *ghubn* needed will

¹¹³³ A. Alsunhori, *Masadir Alhaqq Fe Alfiqh Alislame: Drisah Muqarinh blifiqh Algarbi*, vol 2 (Ma'ahd Alderasat Alarbiah Alaliah 1967) 159.

¹¹³⁴ Ibid 150; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 104; See below for more about this point.

¹¹³⁵ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 103.

¹¹³⁶ Ibid; This is required especially by *Hanafis*, but it is less evident in other schools of Islamic law; M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 240-243; Generally Islamic law does not look at the equality between the considerations, and *ghubn* in itself does not give the option or the right to rescind, as long as the parties have the legal authority to perform the contract, and the circumstances of the contract were free from any illegal methods or unusual circumstances which distorts the economic stability and places unfairness on one of the parties. This is said to maintain the freedom of business and contract between the parties. Otherwise, Islamic law will intervene to remove such *ghubn*, unfairness and harm, and that seems to be the case generally: if the *ghubn* was in regard to contracts of parties who need protection e.g. contracts concerning the money of interdicted persons; if *ghubn* was excessive according to some jurists, if the contract relies on trust between the parties e.g. trust sales, *istirsal* sales (see below for more about those sales). Some Islamic jurists especially *Hanafis* were of the view that to have an actionable case of *ghubn*, it must be accompanied with fraud, and to have an actionable fraud it must be accompanied by *ghubn*. Such requirement is less evident in other schools (see below); Generally light *ghubn* does not affect the contract (unless in certain cases, e.g. buying and selling while one of the parties has a sickness of death or *marad almawt*), as only excessive *ghubn* can affect it. For the right to rescind when there is

differ between fraudulent acts and verbal fraudulent statements, where generally it does not need to be significant in acts, but it does need to be significant in verbal statements.¹¹³⁷ That will be explained as follows:

- **Types of Fraud Or Misrepresentation**

I Fraudulent Acts (*Tadlis Fi'lai*)

Fraudulent acts constitute a positive step, and precisely an act as differentiated from other types of fraud.¹¹³⁸ The act is meant to induce the party by deceit to enter the contract, and causes *ghubn*.¹¹³⁹ It may take the form of faking a description of the object in the contract or

excessive *ghubn* in the contract: *Hanafis* do not allow annulment for excessive *ghubn* unless it is accompanied with fraud, however, annulment for excessive *ghubn* even with no fraud can be allowed as an exception, e.g. if the contract concerns the money of interdicted persons; *Hanbalis* allow annulling the contract for excessive *ghubn* with or without fraud in: *najash* sale (see below for meaning), *istirsal* sale (see below for meaning) and *talgee alrkban* (which happens when a person goes to those who bring goods to a country or a town and buys such goods from them before they enter the town or country and know the price), *Malikis* give the right for annulment in *najash* only, while *Shafais* state that excessive *ghubn* does not affect the contract whether it was with fraud or not, and did not allow annulment (W. Alzhuaili, *Alfiqh Alislamee Wa Adltah* (Dar Alfikr 1991) 578; It must be noted that some secular law books study *ghubn* and fraud separately; however, they are not studied in that way in Islamic law (See N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 101-102).

¹¹³⁷ See below for the details.

¹¹³⁸ S. Ryaner, *The Theory of Contracts in Islamic Law*, (Arab and Islamic Laws Series, Graham and Tortman, 1991) 216.

¹¹³⁹ Ibid.

changing it to create false impressions or illusions.¹¹⁴⁰ It is regarded as effective fraud even if the *ghubn* was insignificant and generally most jurists consider it as going as far as actual *ghubn*; ¹¹⁴¹ for example, painting old furniture to look as new.

Islamic jurists have developed a doctrine of fraudulent misrepresentation by conduct that covers aspects of deliberate actionable fraud misleading the contracting party and leading him to believe the existence of some characteristic in the object of the contract, which are not there.¹¹⁴² This doctrine is based on the Prophet's *hadith* about *tasriyaa* sale.¹¹⁴³ *Tasriyaa* means binding the teats of female animals (originally ewes, broadened by analogy to others, e.g. cows), to create a false impression to the buyer that the animal is productive with milk.¹¹⁴⁴ *Hanbalis* and the majority of schools except *Hanafis*, granted the defrauded party here the option to affirm the contract without claiming any compensation, or to rescind the contract and return the animal with a measure of dates as a compensation for the milk

¹¹⁴⁰ Ibid; See M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 234.

¹¹⁴¹ S. Ryaner, *The Theory of Contracts in Islamic Law*, (Arab and Islamic Laws Series, Graham and Tortman, 1991) 216; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 104-105.

¹¹⁴² Ibid.

¹¹⁴³ Ibid; According to Abu Hurrira, the Prophet said “*Do not tie the teats of the she-camel. By doing this the milk of the camel is made to accumulate and the future buyer will be deceived about her yield of milk. Whoever buys (the beast mussra) will have the choice between two solutions, keeping the beast or returning it with a measure of dates*”; Y. Alnawwai,, *Sahih Muslim With Alnawwi Explanation* (Kitab Albyoa'a, Dar Alsalaam 1996) 125 *Hadith* 1515; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 104; M. Ali, *A Manual of Hadith* (Curzon Press 1994) 115.

¹¹⁴⁴ Ibid.

used.¹¹⁴⁵ The option will be for three days from discovering the misrepresentation for *Hanbalis*.¹¹⁴⁶ The seller then has to return the price.¹¹⁴⁷ Unlike other schools of Islamic law, *Hanafis* considered that in *tasriya* sale and its analogies there is no real *ghubn* as there is no inherent defect in the object to give the right of annulment, and which fraud intended to cover.¹¹⁴⁸ However, *Hanbalis* and the majority of schools, considered *tasriyaa* sale and its analogies (fraudulent acts with no inherent defects in the goods) an exception to the general rule i.e. fraud must be accompanied by *ghubn*, and granted the right for the defrauded to annul the contract.¹¹⁴⁹ Therefore, cases involving fraudulent acts other than *tasriyaa* and its analogies (cases involving fraudulent acts with inherent defects in the goods) must be accompanied by *ghubn* for rescission to take place, which does not need to be excessive.¹¹⁵⁰ Any rise in the price, even minor but caused by the fraudulent act, will give the right to annul

¹¹⁴⁵ *Hanafis* only allow the buyer to get compensation but not rescission; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 104-105; M. Salamh, *Nathreet Alagd Fe Alfih Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 234; M. Alzarga, *Almadkal Alfih Alislame* (9th edn , Alif Ba'a Press 1968) 381; A. Almaqdasi, *Alsharah Alkabeer ala Almqnia'a Bihamsh Almugni* (Maktabt Almoay'ad 1994) 80-81.

¹¹⁴⁶ S. Ryaner, *The Theory of Contracts in Islamic law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 216; A. Hassan, *Sales and Contracts in Early Islamic Commercial Law* (Islamic Research Institute 1994) 44.

¹¹⁴⁷ Ibid.

¹¹⁴⁸ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 104-105; M. Almaqdasi, *Almugni*, vol 4 (Dar Alaam Alkutb 1996) 80.

¹¹⁴⁹ Ibid; See M. Salamh, *Nathreet Alagd Fe Alfih Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 234; M. Alzarga, *Almadkal Alfih Alislame* (9th edn , Alif Ba'a Press 1968) 381; M. Almaqdasi, *Alsharah Alkabeer ala Almqnia'a Bihamsh Almugni* (Maktabt Almoay'ad 1994) 80-81.

¹¹⁵⁰ Ibid.

the contact.¹¹⁵¹ Nonetheless, the right of annulment in these cases to the defrauded party is based on the option of defect (*kiyar alayiab*) as a first resort.¹¹⁵² Therefore, unlike English law, which recognises fraud as an autonomous notion that can annul the contract, Islamic law does not view it as such, and an independent perception of fraud is doubted.¹¹⁵³ Here one can see that Islamic law tries to be as objective as possible, but without undermining providing justice to the defrauded party.

II Fraudulent verbal Statements (*Tadlis Goli*)

Fraudulent verbal statements may take place when, for example, the seller in the contract of sale, attaches some qualities or features to his goods which are not really there, or makes it sound perfect.¹¹⁵⁴ These false verbal statements induce the buyer to enter the contract with the seller.¹¹⁵⁵ These kinds of verbal statements are not welcomed by Islamic law as they are

¹¹⁵¹ Ibid.

¹¹⁵² The deliberateness here will not matter, so the option of defect applies even if the misrepresentation is accidental; See N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Tortman 1984) 70; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 104.

¹¹⁵³ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 104-105; See G. Treitel, *Treitel on The Law of Contract* (E. Peel ed, 13th edn, Sweet & Maxwell 2011) 362-440.

¹¹⁵⁴ S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 216, 225–229; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 104; A. Alsunhori, *Masadir Alhaqq*, vol 2 (Ma'ahd Alderasat Alarbiah Alaliah 1967) 155; M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 234.

¹¹⁵⁵ Ibid.

swindling and cheating.¹¹⁵⁶ However, they do not affect the contract in question unless accompanied by ‘significant’ inequality in considerations exchanged between the parties or what is called *excessive ghubn*.¹¹⁵⁷ This is the only situation when the defrauded will have the option to rescind the contract and the contract will be voidable until it is affirmed by the defrauded party.¹¹⁵⁸ This can be contrasted with the fraudulent acts which may annul the contract even when the *ghubn* is insignificant.¹¹⁵⁹

The justification for requiring excessiveness of *ghubn* in verbal fraudulent statements in Islamic law is that in trade, mild lies regarding the object sold are likely to happen for marketing and advertising purposes.¹¹⁶⁰ If Islamic law penalised every minor lie, business would be rather paralysed.¹¹⁶¹ Accordingly, it confines its attention to the degree of harm these statements cause to the parties.¹¹⁶² Similarly, such distinction exists in English common

¹¹⁵⁶ Ibid; See above under 4.3.

¹¹⁵⁷ Ibid; M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamiyah 1994) 233; M. Abuzahrah, *Almulkyih Wa Nathryat Alagd Fe Alsharia'a Alislamiyah* (Dar Alfikr Alarbi 1976) 481; M. Alzarga, *Almadkal Alfiqhi Alaam* (9th edn, Alif Ba'a Press 1968) 380.

¹¹⁵⁸ Ibid.

¹¹⁵⁹ See above.

¹¹⁶⁰ S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 244; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 105.

¹¹⁶¹ Ibid.

¹¹⁶² Ibid.

law which also differentiates between mere puffs and promises regarding certain facts within the doctrine of misrepresentation.¹¹⁶³

These general rules in Islamic law have their exceptions in some situations. Fraudulent verbal statements may annul the contract without need for significant *ghubn* in both trust sales and *istirsal* sales.¹¹⁶⁴ In those kinds of sales, the statements of parties play a considerable role in concluding the sale.¹¹⁶⁵ In any way, the main options system which must be resorted to before exercising the option of fraud, covers most incidents of verbal fraudulent statements.¹¹⁶⁶ Therefore, rescission based on the option of fraud is hardly recognisable in respect of verbal fraudulent statements apart from these exceptions.¹¹⁶⁷

It can be deduced from the aforementioned that Islamic law's approach to misrepresentation is more limited than English law as it only includes fraudulent misrepresentations. Also, it is more limited in incurring liability for fraudulent misrepresentation whether acts or verbal

¹¹⁶³ Ibid; See above under 4.4 for more on misrepresentation in English law.

¹¹⁶⁴ Trust sales are sales which do not depend on bargaining, instead the seller informs the buyer of the value he paid for the goods and on that basis demands a certain price. It has generally three kinds: *mudrabha*, *wathe'a*, and *tawlyyah*; *Istirsal* sales which are considered exceptions to *Hanbalis* and *Malikis* are sales where one of the parties authorises the other to buy or sell from him according to the market price, since he does not know the real value; See M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 230; A. Almaqdasi, *Alsharah Alkabeer ala Almqnia'a Bihamsh Almugni* (Maktabt Almoay'ad 1994) 79; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 105- 106.

¹¹⁶⁵ Ibid.

¹¹⁶⁶ N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham & Trotman 1984) 72.

¹¹⁶⁷ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 106.

statements as it is more concerned with their consequences on the balance of the contract, rather than their psychological effect on consent.¹¹⁶⁸ It therefore gives attention to the harm that they cause to the injured party and attempts to rectify such harm.¹¹⁶⁹ On that basis, it adopts the objective creation of *ghubn* as a standard for annulment.¹¹⁷⁰ Besides, Islamic law emphasises on finding causality between the perpetrator of fraud and the consequences of fraud to impose liability.¹¹⁷¹

On the contrary, English common law's position is broader in nature regarding misrepresentation, as it includes not only fraudulent but also innocent and negligent misrepresentations.¹¹⁷² Also it seems broader in respect of incurring liability for fraudulent misrepresentations, as it does not require disproportion in considerations between the parties of the contract whether excessive or not.

A vital requirement in both systems is the inducement by the misrepresentation to enter the contract, and both systems admit misrepresentation by conduct or by verbal statements.¹¹⁷³

¹¹⁶⁸ See above; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 102-103.

¹¹⁶⁹ Ibid.

¹¹⁷⁰ See above; There were attempts by some jurists to set a strict measure for significant *ghubn* by a fraction of the price (M. Alzarga, *Almadkal Alfiqhi Alaam* (9th edn, Alif Ba'a Press 1968) 387), while others considered that there is *ghubn* where the price is higher or lower to the agreed price by experts (A. Alkasani, *Bada'a Alsanaa'a fe Tarteeb Alsharea'a*, vol 5 (Dar Alkutb Alilmiah 2003) 30) (N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 108).

¹¹⁷¹ See above; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 102-103.

¹¹⁷² See above under 4.4 for more about misrepresentation in English law.

¹¹⁷³ See above; See also 4.4 for misrepresentation under English law.

However, the distinction in English law between statements of fact, opinion, and intention is not clear in Islamic law.

As regards the remedies, both systems allow the disadvantaged party to rescind the contract if a misrepresentation exists, and the contract will be as if it never existed.¹¹⁷⁴ A shared bar to rescission seems to be affirmation by the disadvantaged party, and lapse of time.¹¹⁷⁵ Nonetheless, in Islamic law, all other options must be exhausted before resorting to the option of fraud.¹¹⁷⁶ Both systems admit indemnity or compensations aiming for restitution as a remedy when electing to rescind; however, there seem to be no damages provided in Islamic law for misrepresentation as in English law.¹¹⁷⁷

Another point which must be highlighted is the different approaches towards the general doctrine of misrepresentation in both systems. When reviewing the authorities in Islamic law, it seems to be that Islamic law does not have a whole general theory of misrepresentation which consists of all types fraudulent, innocent or negligent, by conduct or by verbal statement parallel to English law.¹¹⁷⁸ It rather depends on its development of hypothetical cases which can consist of principles of general application,¹¹⁷⁹ which may justify not including other types of misrepresentation. This is not surprising as it seems to be an

¹¹⁷⁴ See above; See also 4.4 for misrepresentation under English law.

¹¹⁷⁵ Ibid.

¹¹⁷⁶ Ibid.

¹¹⁷⁷ Ibid.

¹¹⁷⁸ See N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Tortman 1984) 73.

¹¹⁷⁹ Ibid.

extension to the general theory of contract in Islamic law which adopts the same approach¹¹⁸⁰ and which can justify calling it the ‘theory of contracts’ rather than the ‘theory of contract’.¹¹⁸¹ The most obvious principle which can be observed regards misrepresentation is the concern of Islamic law to rectify the material consequence or harm caused to the injured party illegally enriching the other party on his account which is caused by fraud, but not questioning the psychological effect of misrepresentation on consent as stated earlier.¹¹⁸² This principle is unique to Islamic law and corresponds to religion and morality which is not found in the same way in English law, as the two have different approaches: Islamic law takes a more objective and casuist approach, where morality prevails over the contractual considerations; on the other hand, English law is more subjective and contractual considerations and the autonomy of the will has priority.¹¹⁸³

Hence, it is evident that the concept and effects of misrepresentation are different in Islamic law than in English general contract law.

¹¹⁸⁰ See above under 4.3; See A. Elhassan, ‘Freedom of Contract, Doctrine of Frustration and the Sanctity of Contracts in Sudan Law and Islamic law’ (1985) 1 ALQ 51, 54; H. Hassan, ‘Contracts in Islamic Law: The Principles of Commutative Justice and Liberality’ (2002) 13(3) Journal of Islamic Studies 257, 258.

¹¹⁸¹ Ibid.

¹¹⁸² See above.

¹¹⁸³ N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 103.

- **Third Party Fraud**

Third party fraud in Islamic law can take the form of *alnajash*.¹¹⁸⁴ *Alnajash* is where a person (third party) offers fictitious bids for the goods with no intention to buy them for himself, for the sake of raising the price of the goods and encouraging higher bids.¹¹⁸⁵ The majority of *Hanbalis*, *Malikis* and some *Shafais* provide the disadvantaged party with the option to rescind the contract, where *Hanafis* and other *Shafais* do not allow that.¹¹⁸⁶ According to the proponents of rescission, there must be a significant *ghubn*, intent to raise the price while not willing to buy, ignorance by the buyer of *alnajash*, and collusion between the third party and the seller.¹¹⁸⁷ The deceived buyer will have the option to rescind or ratify the contract, but when rescinding he must return the goods with compensation for the consumption if any, in exchange for the return of the whole price by the seller.¹¹⁸⁸

Accordingly, it seems that English and Islamic law have a similar approach as regards misrepresentation or fraud coming from a third party, as generally the misrepresentation must

¹¹⁸⁴ S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 240.

¹¹⁸⁵ Y. Alnawwai, *Sahih Muslim with Alnawwi Explanation* (Kitab Albirr wa alsilah wa Aladab, Dar Alsalaam 1996) 123-124, *Hadith* 2563; The basis of *alnajash* is the *hadith* narrated by Abu Hurira that the prophet has said “Do not commit Najash...” .

¹¹⁸⁶ M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamiyah 1994) 231-232; M. Alzarga, *Almadkal Alfiqhi Alaam* (9th edn, Alif Ba'a Press 1986) 377-378 Almaqdas, *Alsharah Alkabeer ala Almqnia'a Bihamsh Almugni* (Maktabt Almoay'ad 1994) 79.

¹¹⁸⁷ Ibid.

¹¹⁸⁸ S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 239.

be made by one of the parties or their agents; however, misrepresentation coming from a third party can be considered in exceptional cases.¹¹⁸⁹

III Fraudulent Non-Disclosure (*Tadlis By Kitman Alhaqiaqh*)

As opposed to fraudulent acts and statements which are positive steps, fraudulent non-disclosure is regarded as a negative form of fraud (*tadlis*) or misrepresentation.¹¹⁹⁰

Fraudulent non-disclosure is forbidden by all jurists according to the *Quran* and *Sunnah*.¹¹⁹¹ *Allah* commanded humans not to conceal the truth in a transaction and not to mix it with falsehood.

*“And cover not truth with falsehood, nor conceal the truth when you know (what it is).”*¹¹⁹²

The Prophet (P.U.H.) also, in several *hadiths*, disallowed concealing defects in the object of contract. For example:

*“A Muslim is not allowed to sell his brother anything with a defect unless he points it out to him.”*¹¹⁹³

¹¹⁸⁹ See *Alnajash* example in Islamic law above; See under 4.4 for misrepresentation in English law.

¹¹⁹⁰ M. Salamh, *Nathreet Alagd Fe Alfih Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamyiah 1994) 451.

¹¹⁹¹ See below.

¹¹⁹² The *Quran*, *Surrat Albagrah*, verse 42.

¹¹⁹³ M. Alquzoini, *Sunn Ibn Majah* (Kitab Altijarat, Almaktabah Alimiah 1999) 755, *Hadith* 2246; N. Obeid, *The Law of Business Contracts in the Arab Middle East* (Arab and Islamic Laws Series, Kluwer Law International 1996) 82.

The Prophet (P.U.H.) described the penalty of the perpetrators of non-disclosure who tend to conceal a truth related to the transaction.

“Narrated by Athaleh b. Asqa’a (r.a.): I heard the Holy Prophet say: whoever sells a defective thing without disclosing it continues to be in the wrath of Allah and angels continue to curse him.”¹¹⁹⁴

By analogy to *tasriya* sale, Islamic jurists developed an implied warranty of merchantability against the defects in goods.¹¹⁹⁵ If the seller did not disclose the defects in his sold goods deliberately, the sale will still be valid but it will be voidable, and the buyer will have the option of fraud (*kiyar altadlis*) together with the option of defect (*kiyar alayib*) even though the option of defect must be the first resort.¹¹⁹⁶ The benefit of this double remedy is to provide a solution where a defect fails to arise or the object could not be returned.¹¹⁹⁷ The

¹¹⁹⁴ M. Alquzoini, *Sunn Ibn Majah* (Kitab Altijarat, Almaktabah Alimiah 1999) 755, *Hadith* 2247; K. Maulana, (trans) *Mishkatul Masabih, Kitab al-Buyu* (Lahore 1997) 284; M. Billah, ‘Regulatory Framework of Doctrine of “Utmost Good Faith” In Takaful (Islamic Insurance)’ <<http://www.icmif.org/2k4takaful/site/documents/Good%20Faith%20in%20Takaful.doc>>.accessed 19 October 2009.

¹¹⁹⁵ S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 231; Compare with English Sale of Goods Act, ss 14(2), C2, where there is an implied condition that goods sold in the course of business must be of satisfactory quality unless the defect is inspected by the buyer and that inspection can reveal the defect, or when the buyer is informed about the defect before the conclusion of the contract; See E. McKendrick, *Contract Law* (10th edn, Palgrave Macmillan 2013) 219.

¹¹⁹⁶ S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 231; M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho’on Alislamyiah 1994) 352; W. Alzhuaili, *Alfiqh Alislamee Wa Adltah* (Dar Alfikr 1991) 219-220.

¹¹⁹⁷ S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 231; If non-disclosure is not deliberate, the buyer will have only the option of defect.

burden of proof rests on the defrauded party to reveal that had he known the circumstances or the defect, he would not have concluded the contract.¹¹⁹⁸

Disclosure of defects aside, a general duty of full disclosure is required in trust sales where anything which may give the buyer a reason not to desire the good even with no defect, e.g. staying too long with the seller, or its market change, must be disclosed. Non-disclosure here can give the disadvantaged party the option of fraud to rescind the contract.¹¹⁹⁹

Based on the aforementioned, it can be inferred that disregarding disclosing defects in the subject matter, a general duty of disclosure is not required unless in certain types of contracts, e.g. trust sales, only here where full disclosure becomes an obligation and where failure to disclose becomes deceitful.

Therefore, it can be stated that both English and Islamic laws are similar as they do not require a general duty of full disclosure in the transaction in general, and only require it in certain cases, e.g. insurance contracts in English law, and trust sales in Islamic law. However, in the author's view such similarity must be treated with caution.

It is important to remember that above all, Islamic contract law requires a general duty of good faith in the contract and that is wider than non-disclosure, which is not the case in English general contract law. Unlike English general contract law, this general doctrine of good faith includes all cases violating good faith, not only cases of non-disclosure, and it is not confined to the pre-contractual stage as it must be observed in every aspect of the transaction at all times whether before entering the contract, during its performance, or while

¹¹⁹⁸ Ibid.

¹¹⁹⁹ M. Algurnadi, *Alqwaneen alfiqhyiah* (Dar Alargam 2008) 227; M. Salamh, *Nathreet Alagd Fe Alfiqh Alislame mn Kilal Agd Albai* (Wazart Alawgaf Wa Alsho'on Alislamiyah 1994) 451-452.

in termination.¹²⁰⁰ It also necessitates that the parties negotiate in a well-informed environment, and disclose all the information relevant to the transaction as non-disclosure of such information becomes a violation of good faith.¹²⁰¹ Consequently, Islamic law does not allow parties to negotiate completely at arm's length, for the benefit of balancing the contracting powers and protecting the weaker party. So even there is no clear obligation of general disclosure in the transactions in general, liability can be incurred if non-disclosure violates good faith.

On the other hand, English law does not recognise a general duty of disclosure or a general doctrine of good faith during the negotiation period, or otherwise.¹²⁰² In fact, it does not recognise any duties between parties in the negotiating stage, except in case of misrepresentation or a contractually binding promise.¹²⁰³ Additionally, it is more concerned with the responsibility of the defendant in causing the mistake by misrepresentation; faithful to the *caveat emptor* principle and from this point, English law does not recognise a general duty of disclosure.¹²⁰⁴

*“Whatever be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.”*¹²⁰⁵

¹²⁰⁰ See above under 4.3.2.

¹²⁰¹ Ibid.

¹²⁰² See above under 4.3 and 4.2; *Walford v Miles* [1992] 2 AC 128.

¹²⁰³ Ibid.

¹²⁰⁴ J. Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (The Contract Law Library, 3rd edn, Sweet and Maxwell 2012) para 16-02; *Smith v Hughes* (1867) LR 6 QB 597.

¹²⁰⁵ *Smith v Hughes* (1867) LR 6 QB 597 [607].

So, in cases where there is no duty of disclosure required, but there is a violation of good faith, liability may not be incurred. However, the situation of good faith may be subject to change after the *Yam Seng* case.¹²⁰⁶

The general theory of contract in Islamic law may give a justification that disclosure is only required in certain situations. As mentioned earlier, the general theory of contract in Islamic law relies on hypothetical classical examples which can contain principles which may be of a general application.¹²⁰⁷ There is no wholly embracing theory of contract, and the same applies to misrepresentation and non-disclosure.¹²⁰⁸ The remedies available in Islamic law seem to be similar to English law as regards cases of effective non-disclosure as both systems generally give the disadvantaged party the right to rescind the contract.¹²⁰⁹ Damages in general are not provided in both systems for non-disclosure.¹²¹⁰ However, exceptions for damages in English law can exist which include partial non-disclosure.¹²¹¹ In Islamic law, if the buyer elects to

¹²⁰⁶ See above under 4.2; See *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514.

¹²⁰⁷ See above, after fraudulent verbal statements.

¹²⁰⁸ Ibid.

¹²⁰⁹ See above under 4.4.

¹²¹⁰ Ibid; S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 204-239.

¹²¹¹ Partial non-disclosure is considered an active misrepresentation and therefore damages can be available in the same way as misrepresentation; however, pure or complete non-disclosure does not amount to active misrepresentation and therefore damages are not available; Also when the statute provides for damages for non-disclosure, that will be applied; See 4.4 for more details.

rescind, a compensation aiming for restitution is provided with returning the goods, in exchange for returning the whole price by the seller.¹²¹²

¹²¹² S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 204-239.

4.6 CONCLUSION

After this discussion of good faith, misrepresentation, and non-disclosure in Islamic and English common law systems, some important conclusions can be drawn. First of all, as Foster said, one must look beyond appearances.¹²¹³ The implied notion of good faith in Islamic law is an indication of its inherence in every aspect of the transaction, and it must not be seen in any way as equivalent to its absence in English common law. Islamic law principles which rely on the obedience to the precepts of Islam, and morality, illustrate good faith clearly in every aspect when requiring equilibrium between parties in bargaining powers, judicial discretion for adjusting contractual obligations, and the need for certainty in contract formation. Moreover, the unique system of options in Islamic law is a preventive safeguard for the will against any infringement of good faith. Another example proving such principle is non-disclosure, whereas it seems that both systems do not consider that a general duty of disclosure is required, except in certain situations. A careful observation to the aspiration of Islamic law to respect the principles of Islam and the demand of good faith in the transaction with disclosure being part of it cuts any doubt of shared omission. In fact, these examples reveal that when comparing legal systems which correspond to different bases and values, one must be open minded to the hierarchy of priorities and interests which both systems try to protect to be able to understand the presentation of principles and concepts. The aspirations of Islamic law to the precepts of Islam, and English law to economic efficiency mean that comparison must consider that certain standards may be applicable to

¹²¹³ N. Foster, 'Islamic Commercial Law (II): An Overview. Some Principles and Rules' (Indret: Revista para el Análisis del Derecho, Barcelona, January 2007) <http://www.indret.com/pdf/405_en.pdf> accessed 20 October 2009.

one system and not the other; therefore, it can be hard to decide which is better in certain aspect, where different measures of assessment are being used.¹²¹⁴

Regarding misrepresentation, it is evident that Islamic law is objective and preventive, rather than remedial like English law. It hardly examines the state of mind of the induced party, and relies more on the system of options as a first resort. Only if the preventive measures do not work will the remedial theory of defects of consent be sought. Unlike English law, misrepresentation in Islamic law always stands for fraud or *tadlis*, and there is no distinction between negligent or innocent misrepresentations. The requirement of inducement of the contracting party to enter the contract seems to be shared by both systems. However, Islamic law adopts once again an objective measure to avoid subjectivity related to the will of the parties, i.e. *ghubn*. In the realm of fraudulent statements, one can easily discern that both systems distinguish between mere sale puffs and specific assertions of certain facts, which is healthy to encourage trade and marketing.

As a final remark, it is obvious that Islamic law is very concerned that parties contract in a well-informed environment, and attempts to provide justice when they are not. On the other hand, it tries to balance this goal with the settlement of economic relations, and therefore applies preventive measures as a first solution. Even if remedial measures are sought, objectivity seems to be the guiding pattern, compared to the subjectivity in English law.

The concept and nature of the duty of good faith in insurance law can be different to what is found in general contract law. This is due to the special nature of insurance and the significance of the duty in remedying the information asymmetry between the parties. In the next chapter, the concept and the limits of the duty of good faith, disclosure, and honest representation in English and Saudi insurance laws will be critically investigated and compared.

¹²¹⁴ Ibid.

CHAPTER 5

THE CONCEPT AND LIMITS OF THE DUTY OF GOOD FAITH IN SAUDI AND ENGLISH INSURANCE LAWS

5.1 INTRODUCTION

The application of the duty of good faith in insurance contracts in English insurance law under the MIA1906 has always been problematic and confusing, especially for assureds considering that the only remedy for breach is avoidance *ab initio*.¹²¹⁵ The assureds' rights under the policy can be constantly threatened because of flaws in applying the duty, or because of a lack of understanding of the concept of the duty or the consequences of breaching it which leads to increased litigation.¹²¹⁶ Under the MIA1906, insurers can avoid the policy, claiming breach of the duty of good faith, non-disclosure, or misrepresentation which may be irrelevant to the loss, and where materiality is judged based on its effect on a prudent insurer.¹²¹⁷ Nonetheless, the position of consumer assureds has changed with the promulgation of the CIA2012 offering more protection to consumers as vulnerable parties in the contract.¹²¹⁸ The duty of good faith in Saudi insurance laws, on the other hand, is not perfectly clear and is scattered between different regulations, even though it has an assured-friendly approach in general.¹²¹⁹

This chapter will attempt to tackle the concept and limits of the duty of good faith in English and Saudi insurance laws to clarify the picture, especially for assureds. It will start by

¹²¹⁵ MIA1906, s 17, see Ch7 for details on remedies.

¹²¹⁶ See Ch 1.

¹²¹⁷ MIA1906, ss 17-20; Causation is not required between the misrepresented or non-disclosed fact and the loss (*Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER 581).

¹²¹⁸ The CIA2012 was given the Royal Assent on the 8th of March, and came into effect on the 6th of April 2013 (Commencement order 2012, SI 2013/450); see below for more.

¹²¹⁹ See below.

explaining the rationale of the duty and its development in both systems, then, explore the disclosure and misrepresentation requirements provided by the laws and regulations. Next, the source of the duty and its legal nature will be discussed followed by its mutuality in both English and Saudi Insurance laws. After this, the chapter will explore the role of the state of mind or knowledge in applying the duty and the materiality test employed by both systems as significant elements of the duty. Also the chapter will examine the inducement requirement, and the duration of the duty including the post contractual duty of good faith. Finally the issues of waiver and burden of proof will be discussed. Suggestions by the author will be given throughout the chapter to develop the duty towards a more comprehensible and fair approach.

The chapter will contribute towards providing a critical comparison between English and Saudi insurance laws as to the main elements of the duty of good faith. Such comparative conceptual analysis is of the essence in comprehending the duty, which enables suggestions and recommendations for the development of Saudi insurance laws in general and the duty of good faith in particular.

5.2 THE DUTY OF GOOD FAITH: ITS RATIONALE AND HISTORICAL DEVELOPMENT

Under English general contract law, parties have a duty to refrain from any positive misrepresentation; however, they do not owe each other a duty to disclose all material information.¹²²⁰ Nonetheless, that it is not the case in a class of contracts which are called contracts of ‘utmost good faith’ or *uberrimae fidei*¹²²¹ where the insurance contract is considered a major illustration.¹²²² In the insurance contract, the duty of refraining from any positive misrepresentation is extended to include full disclosure of all material information inducing insurers to the contract.¹²²³

The duty was first introduced by Lord Mansfield in the 18th century in *Carter v Boehm*¹²²⁴ and was then codified in the MIA1906.¹²²⁵ Even though Lord Mansfield attempted to generalise the principle of good faith to be applicable on all commercial contracts and dealings similar to civil law jurisdictions, his attempt was not followed by subsequent cases,

¹²²⁰ *Walford v Miles* [1992] 1 All ER 453; See Ch 4 for more.

¹²²¹ *Rozanes v Bowen* (1928) 32 LlL Rep 98 [102] (Scrutton L J).

¹²²² *Mackenzie v Coulson* (1869) LR 8 Eq 368 [375] (James VC) where it was stated: ““*there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance*”.

¹²²³ MIA1906, ss 17-20; *Carter v Boehm* (1766) 3 Burr 1905.

¹²²⁴ (1766) 3 Burr 1905.

¹²²⁵ See MIA1906, ss 17-20.

which confined the duty to insurance contracts.¹²²⁶ It was submitted that the main driver of this introduction was purely practical, based on the ‘special’ nature of insurance contracts where most of the information lies within the sole knowledge of the assured and not the insurer.¹²²⁷

Hence, it can be said that the duty of good faith in English insurance law was not introduced based on moral principles, nor as an encouragement to honesty and fair dealings. Instead it was based on an economic efficiency factor needed to conclude the insurance operation by the least cost possible.¹²²⁸ There are risks in insurance which are within the sole knowledge of the assured.¹²²⁹ The duty of good faith obliges the assured to disclose these risks along with

¹²²⁶ *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER (Mustill L) ; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 (Hobhouse L); However, it must be noted that the duty of disclosure which Mansfield L attempted to generalise was not as broad as it is today as subsequent case law has broadened the duty of disclosure in a way which is thought not to be intended by Mansfield L (*Carter v Boehm* (1766) 3 Burr 1905 [1910] (Mansfield L) ; See below).

¹²²⁷ See *Carter v Boehm* (1766) 3 Burr 1905 [1909] (Mansfield L) where it was stated :

“Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back of such a circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run at the time of the agreement.”

¹²²⁸ B. Harnett, ‘The Doctrine of Concealment: A Remnant In The Law Of Insurance’ (1950) 15(3) Law and Contemp Probs 391, 408.

¹²²⁹ *Carter v Boehm* (1766) 3 Burr 1905.

any material information to enable insurers to assess them cheaply and precisely.¹²³⁰ This can decrease costs for both the insurers, since it trims down investigation costs, and for the assureds, since it leads to more precise premiums.¹²³¹

Unlike English law, which views the duty of good faith as an element only confined to special contracts of a certain nature, Saudi law views the same duty as a vital element which must be perceived in all contracts, including the insurance contract.¹²³² The duty of good faith is already incorporated in different aspects and principles in general contract law in Saudi Arabia, i.e. *Sharia'a* law according to the *Hanbali* teaching, although not in one neat conception, which is not the case in English general contract law.¹²³³ In contrast with English law, the main drivers for this duty are to follow the Islamic perceptions of preserving fairness and equality for social well-being, and economic efficiency is only considered within a moral framework which safeguards justice in the contract as reflected in various *Quranic* verses and *Hadiths*.¹²³⁴ Hence, it is only natural to see the duty of good faith already forms part of Saudi insurance law.

¹²³⁰ Ibid; B. Harnett, 'The Doctrine of Concealment: A Remnant In The Law Of Insurance' (1950) 15(3) Law and Contemp Probs 391, 408.

¹²³¹ B. Harnett, 'The Doctrine of Concealment: A Remnant In The Law Of Insurance' (1950) 15(3) Law and Contemp Probs 391, 408.

¹²³² See Ch 4 for more.

¹²³³ Ibid.

¹²³⁴ Ibid.

While tracing the historical development of the duty of good faith in English Marine insurance cases, it is clear that it departs from the general law of misrepresentation.¹²³⁵ Firstly, the duty of good faith requires refraining from any misrepresentation as well as volunteering information about material facts.¹²³⁶ Secondly, the state of mind of the assured does not play any role in breaching the duty. As a result, the effect of fraudulent, negligent or innocent misrepresentations or non-disclosure will be the same.¹²³⁷ Additionally, Lord Mansfield established some limits to the duty of disclosure, as it does not include matters that are considered common knowledge or ought to be known by the insurer.¹²³⁸ What is interesting is that after *Carter v Boehm*, subsequent cases in the 19th century broadened the duty of disclosure in an approach that was thought not to be intended in the first place by Lord Mansfield himself when introducing the duty.¹²³⁹ Consequently, the duty included disclosure of facts external to the risk and associated with the characteristics of the assured or what is called ‘moral hazard’.¹²⁴⁰ Moreover, some cases contradicted the limits initially

¹²³⁵ See below.

¹²³⁶ *Carter v Boehm* (1766) 3 Burr 1905.

¹²³⁷ *Messrs Dennistoun, Buchanan and Company, Merchants in Glasgow v David Lillie and others, Underwriters in Glasgow* (1821) 3 Bli 202; *Joel v Law Union & Crown Insurance Co* [1908] 2 KB 863; *Hamilton & Co v Eagle Star and British Dominions Insurance Co Ltd* (1924) 19 Ll L Rep 242; See below under 5.6 for more.

¹²³⁸ *Carter v Boehm* (1766) 3 Burr 1905.

¹²³⁹ See R. Hasson, ‘The Doctrine of Uberrima Fides in Insurance Law: A Critical Evaluation’ (1969) 32 MLR 615, 618; See below.

¹²⁴⁰ *Ionides v Pender* (1873-74) LR 9 QB 531.

proposed on the duty of disclosure.¹²⁴¹ In 1906, all these cases were codified in the MIA1906 and the duty of good faith became a statutory duty.¹²⁴² The MIA1906 was subject to considerable criticisms in terms of its harshness to the assureds since the remedy for breaching the duty is avoidance *ab initio*.¹²⁴³ This led to several law reform proposals and consultation papers,¹²⁴⁴ where some of the suggestions were adopted recently in the CIA2012 which applies now to consumer insurance instead of the MIA1906 which still applies for business insurance.

While tracing the historical development of good faith in Saudi insurance law, it is observed that good faith as so far as concerning disclosure and honest representation was first mentioned in the sphere of insurance laws in the CCL1931, section 11, which mainly concerns marine insurance. Article 342 of the CCL1931 provides the consequences of non-disclosure and misrepresentation by the assured regarding the information that must be included in the insurance contract, and the consequences of any disparity in information between the bill of lading and the insurance contract. However, the article does not announce that the contract of insurance is a contract of good faith as in English insurance law.¹²⁴⁵ This

¹²⁴¹ *London Assurance v Mansel* (1897) CH D 363.

¹²⁴² MIA1906, ss17-20.

¹²⁴³ MIA1906, s17. The remedy is an all or nothing remedy and it is not much of a benefit to the assured especially if the loss occurred as he will prefer to be indemnified rather to avoid and have the premiums back; For a detailed analysis of the remedies, See for example: H. Bennett, 'Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law' [1999] LMCLQ 165, 211 ; Sir A. Longmore, 'An Insurance Contracts Act for a New Century' [2001] LMCLQ 356, 366; P. Eggers, 'Remedies for the Failure to Observe the Utmost Good Faith' [2003] LMCLQ 249, 255; See Ch 7.

¹²⁴⁴ For example: LCCP2007, LCCIL2009; LCCP2011; LCCP2012.

¹²⁴⁵ MIA1906, s 17.

approach can be justified since good faith must be evident in all contracts in Saudi laws as it is not an idiosyncrasy of the insurance contract per se.¹²⁴⁶ The consequence of non-disclosure and misrepresentation provided in the article is the avoidance of the insurance contract, even if they did not cause the loss.¹²⁴⁷ However to give that effect, the undisclosed or misrepresented facts must lead to a risk other than the risk insured, or lead to a change in the degree of the risk.¹²⁴⁸ In other words, it must have an effect on the conditions of the contract if the insurer had known the true or undisclosed facts. It must be noted that the change in the risk is not confined to an increasing change. Consequently, even changes which decrease the risk can be classified as a ‘change in the risk’ and therefore lead to avoidance. In this sense, it seems that the CCL1931 is more stringent than the MIA1906 considering that in the MIA1906, facts which diminish the risk are excluded from the ambit of disclosure by the assured.¹²⁴⁹ The reference in deciding the materiality of the information is not clear whether it is a prudent insurer or a reasonable assured. Nonetheless, it is the author’s deduction that the reference will be the insurer given the strict position in the risk changing conditions.

What is interesting is that this early introduction of misrepresentation and non-disclosure in insurance contracts illustrated in CCL1931 did not have much significance as the law was not really applied in practice to insurance cases.¹²⁵⁰ The reason is that the CCL1931 is a dated law and is not considered a comprehensive code that matches the contemporary needs of

¹²⁴⁶ See Ch 4 for more.

¹²⁴⁷ Art 342 CCL1931.

¹²⁴⁸ Ibid.

¹²⁴⁹ MIA1906, s 18 (3) (a).

¹²⁵⁰ See Ch3 for more detailed analysis of the situation.

society.¹²⁵¹ Thus, in practice the legal vacuum is remedied by placing the wording of the insurance policy as a reference for any dispute between the parties, which is rather unfair to the assured considering that the policy is already underwritten by the insurer which holds much power in the contract.¹²⁵² However, the whole legal situation has changed dramatically with the evolvment of the LSCIC2003,¹²⁵³ and also with the announcement of the implementing regulations of the law in 2004¹²⁵⁴ followed by the IMCOCR2008¹²⁵⁵ and the AFR2008.¹²⁵⁶ All these regulations have introduced a more comprehensive legal framework for the relationship between the insurer and the assured including the duty of good faith, honest representation and disclosure.¹²⁵⁷

According to Art 1 of the IMCOCR2008, the regulation applies to “*all insurance and reinsurance companies, including branches of foreign insurance and reinsurance companies, and insurance related service providers in their dealings with their existing and potential customers.*” and it aims to set the minimum levels and general principles which must be met

¹²⁵¹ Ibid.

¹²⁵² Ibid.

¹²⁵³ By Royal Decree M/32 dated 1/8/2003.

¹²⁵⁴ By decision of the Minister of Finance No 569/1 dated 21/4/2004.

¹²⁵⁵ By decision No 103/429 dated 8/9/2008.

¹²⁵⁶ By decision No 124/429 dated 3/12/2008.

¹²⁵⁷ However, these regulations are not considered purely insurance contract laws as they are mainly directed to regulate and guide the insurer.

by them. Insurance service providers include brokers, loss assessors, agents etc.¹²⁵⁸ However, reinsurance activities are not governed by the IMCOCR2008.¹²⁵⁹ The main purpose of the IMCOCR2008 is “*promoting high standards of business conduct within the insurance industry.*”¹²⁶⁰ Hence, it is evident that it is not purely an insurance contract law per se which regulates the duties of both parties of the contract, i.e. the insurer and the assured. However, it is a comprehensive code explaining the duties of the insurer, and to a certain extent the assured in all what surrounds the insurance operation. Moreover, in practice the IMCOCR2008 is what really applies when a dispute rises between parties, given that it is the only code dedicated entirely to organising the duties of the parties. For these reasons, the author chose the IMCOCR2008 to be the core code for comparison, and not the CCL1931. An important highlight of the code is that it applies to both business and consumer insurance and provides them with the same degree of protection, which is a positive position.¹²⁶¹ This can be compared with the English position distinguishing between consumers and businesses.¹²⁶²

The IMCOCR2008 places a general requirement on insurers and insurance service providers including insurance intermediaries, loss adjusters, insurance advisors and claims settlement

¹²⁵⁸ Art 5 IMCOCR2008.

¹²⁵⁹ Art 6 IMCOCR2008; It is not really clear how this can be reconciled with Art 1 IMCOCR2008.

¹²⁶⁰ Art 2 IMCOCR2008.

¹²⁶¹ See Art 5 and Art 6 IMCOCR2008 concerning scope and exemptions.

¹²⁶² The MIA1906 applies to business insurance, while the CIA2012 applies to consumer insurance; See also Insurance Conduct of Business Sourcebook (ICOBS); ICOBS 2.1; See FCA, *Insurance Conduct of Business Sourcebook: FCA Handbook*, Release 122 (FCA February 2012) found in <<http://fsahandbook.info/FSA/html/handbook/ICOBS/2/1>> accessed 24 March 2012.

professionals to act in an honest, fair and transparent fashion and to fulfill their obligations towards their customers under the laws, regulations and the regulator's (SAMA) ¹²⁶³ guidelines.¹²⁶⁴ This general requirement of honesty, fairness and transparency or 'good faith' implies refraining from any non-disclosure or misrepresentation.¹²⁶⁵ Nonetheless, it is interesting to note that, unlike the MIA1906, which announces that good faith must be observed by both the insurer and the assured in the insurance contract;¹²⁶⁶ the IMCOCR2008 does not place such a general duty on the assured and only confines it to the insurer and the insurance service providers.¹²⁶⁷ This approach can be justified in light of the regulation's aim as it is more of a guideline to insurers and insurance professionals rather than assureds.¹²⁶⁸ On the other hand, the IMCOCR2008 includes other parties in the duty of good faith which are the insurance services providers including insurance intermediaries, loss adjusters, claim handling professionals and insurance advisors, something not observed under the MIA1906.¹²⁶⁹

¹²⁶³ SAMA stands for the Saudi Arabian Monetary Agency, which regulates insurance activities in Saudi Arabia.

¹²⁶⁴ Art 11 IMCOCR2008.

¹²⁶⁵ Ibid.

¹²⁶⁶ MIA1906, s17.

¹²⁶⁷ Art 11 IMCOCR2008; However, in practice the Insurance Violation and Dispute Resolution Committee (IVDRC) requires good faith from both insurance parties: the assured and the insurer. Also, later in the IMCOCR2008, specifically in article 37 the assured is required to disclose all material information. Therefore, stressing good faith on the insurer in article 11 of the IMCOCR2008 may be misleading as good faith is required also from the assured; for more see below under 5.5.

¹²⁶⁸ Art 1, 2 IMCOCR2008; See above.

¹²⁶⁹ MIA1906, s 17.

Based on the above mentioned, it can be concluded that ‘good faith’ based on the perceptions of the IMCOCR2008 is “fair, transparent and honest acts by insurers and insurance service providers, and it also includes discharging their duties under the relevant laws and regulations towards the customers”.¹²⁷⁰ Conversely, the English insurance law concept of good faith is not clear. The MIA1906 which applies to business insurance in section 17 announces that the contract of marine insurance is a contract of utmost good faith, but without explaining exactly what is meant by the term “good faith”. However, it follows this with articles on disclosure and honest representation.¹²⁷¹ In sharp contrast, the CIA2012 which applies to consumer insurance does not announce that the insurance contract is a contract of utmost good faith. Instead, it removes any rule of law or application related to the utmost good faith including what is embedded in section 17 of the MIA1906, abolishes the duty of disclosure, and the consumer assured will be only required to take reasonable care not to make a misrepresentation.¹²⁷²

It must be noted that the ICOBS contains numerous guidelines for insurers and insurance intermediaries reflecting good faith in treating customers. This can be observed when the ICOBS requires the insurers and the insurance intermediaries to communicate with customers in a fair manner, with clarity, and without misleading them.¹²⁷³ That will also apply to the communications regarding financial promotions, where reasonable steps must be taken to ensure their clarity and fairness, and where if such clarity and fairness become absent, the

¹²⁷⁰ Art 11 IMCOCR2008.

¹²⁷¹ MIA1906, ss 18-20.; See Ch 4 under 4.2.1 for interpretations of good faith in consumer general contracts.

¹²⁷² CIA2012, ss 2, 11.

¹²⁷³ ICOBS 2.2.2.

approval must be withdrawn with notification.¹²⁷⁴ Fairness was mentioned in the ICOBS as well with regard to handling customers' claims, and managing the conflict of interest that may arise.¹²⁷⁵ Additionally, the ICOBS numerates detailed disclosure requirements reflecting yet again good faith in the transaction.¹²⁷⁶

Nonetheless, despite these fairness obligations on the insurers and the insurance intermediaries in the ICOBS, it is difficult to say that they are identical to the general duty of good faith embedded in section 17 of the MIA1906. The reason is that such fairness obligations are owed by the insurance intermediaries and the insurers, to the customers or assureds, whereas the duty of good faith under section 17 of the MIA1906, is owed by the insurer and the assured to each other. Also, the fairness requirements towards the assured in the ICOBS are not general compared to the MIA1906, and only relate to certain instances, e.g. communication, claims handling, and managing conflict of interest.

In respect of the proposed reforms for business insurance, the LCCP2012 proposes rather a different approach regarding the duty of good faith.¹²⁷⁷ It suggests maintaining the duty of good faith embedded in section 17 of the MIA1906 but as an "interpretative principle" which does not allow any cause of action or remedies to the parties.¹²⁷⁸ Instead the remedies for what can be considered a breach of the duty, e.g. by non-disclosure, or late payment of a claim must be specified for each type of breach in a direct manner in the law itself.¹²⁷⁹ The

¹²⁷⁴ ICOBS 2.2.3; This will apply to pricing claims as well, see ICOBS 2.2.4.

¹²⁷⁵ ICOBS 8.1.1; ICOBS 2.3.

¹²⁷⁶ See below under 5.3 for detailed disclosure duties.

¹²⁷⁷ LCCP2012 paras 10.1–10.19.

¹²⁷⁸ Ibid.

¹²⁷⁹ Ibid.

duty of good faith will have an effect as a '*shield*' colouring the contractual obligation, e.g. using it to refrain the insurer from relying on exclusion clauses in bad faith, not as a '*sword*' with its own remedies.¹²⁸⁰

In the draft clauses of the forthcoming Insurance Contract Law Draft Bill issued recently by the Law Commissions,¹²⁸¹ the LCCP2012 proposals are adopted as the remedy of avoidance based on the duty of good faith is abolished, and therefore parties will no longer be allowed to avoid the contract based on breaching the principle of good faith.¹²⁸² As a result, section 17 of the MIA1906 will be modified as the remedy of avoidance will be removed, while it will still state that insurance is a contract of utmost good faith.¹²⁸³ Nonetheless, the content of the duty of good faith is not determined by the draft clauses and it is left to common law. It must be noted that such position of the duty of good faith will apply to non-consumer insurance in both the pre- and post-contractual stage, while it will apply to consumer insurance for the post-contractual stage only. The reason is that the CIA2012 which governs consumer insurance amends the MIA1906 and the common law position regards the pre-contractual stage only, while the post-contractual stage is left as it is in common law and the MIA1906.¹²⁸⁴

¹²⁸⁰ Ibid; See Ch 7 below for more about this point.

¹²⁸¹ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

¹²⁸² Insurance Contract Law Draft Bill, cl 14.

¹²⁸³ Ibid, cl 14(3).

¹²⁸⁴ R. Merkin, *Colinvaux Law of Insurance* (9th edn, Sweet and Maxwell 2013) para 6-002A; See below under 5.9.

As will be seen later, the Draft Bill stipulates clauses for fraudulent claims and late insurance claim payment.¹²⁸⁵ Therefore, the duty of good faith can be beneficial in regulating post-contractual duties in the sense that it can determine when the term is implied in the contract; however, this is the common law position anyway.¹²⁸⁶ Courts used the duty of good faith to prevent the insurer from using a contractual right in bad faith,¹²⁸⁷ and the Law Commissions opted to leave the approach of the courts as it is regarding using good faith in this way and other similar ways, as a “*shield colouring the contractual obligation*” rather than a “*sword with its own remedies*”.¹²⁸⁸

¹²⁸⁵ Ibid, cls 11-13.

¹²⁸⁶ *Butler and Merkin's Reinsurance Law*; See below under 5.9.

¹²⁸⁷ See LCCP2011 paras, 3.9 - 3.15; See below under 5.9.

¹²⁸⁸ See LCCP2011 para 4.40; See below under 5.9.

5.3 NON-DISCLOSURE AND MISREPRESENTATION

I English Insurance Law:

MIA1906:

Under the MIA1906, which applies to business insurance contracts, disclosure by the assured is highlighted in section 18. The section gives conditions to the information which must be disclosed by the assured before the conclusion of the contract, namely that it must be material to the risk according to its influence over a prudent insurer, and known to the assured or deemed to be known by him.¹²⁸⁹ Also, the section numerates circumstances which do not need to be disclosed by the assured if the insurer does not ask about them, namely: circumstances decreasing the risk, matters known or deemed to be known by the insurer and the insurer is deemed to know, matters of common knowledge, and matters which ought to be known by him in the ordinary course of business, matters which are waived by the insurer, and matters which are subject to a warranty.¹²⁹⁰ Common law has added a requirement of inducement, even though it is not included in the MIA1906.¹²⁹¹ To prove non-disclosure, the insurer must prove that on balance of probabilities, the risk presentation did not reflect the whole picture.¹²⁹²

¹²⁸⁹ MIA1906, s 18(1); Materiality and knowledge will be tackled in detail in the next sections under 5.6 & 5.7.

¹²⁹⁰ MIA1906, s 18(3).

¹²⁹¹ *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER 581.

¹²⁹² *Rendall v Combined Insurance Company of America* [2005] EWHC 678 (Comm), [2006] Lloyd's Rep IR 732; See *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1992] 1 Lloyd's Rep 101 [106] (Waller J) where at first instance it was decided that the disclosure made by the brokers regarding the reassured's claims was enough as full documents were presented regarding the periods of previous claims, even though the brokers

Disclosure by the agent is stressed in section 19 of the MIA1906, which requires the agent before the conclusion of the contract to disclose material information known by him or deemed to be known by him or those that the assured is required to disclose.¹²⁹³

In respect of misrepresentation, the parties in an insurance contract must refrain from any positive misrepresentation as the situation in general common law and that is indicated by section 20(1) of the MIA1906 which states that:

“Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.”

Hence, the insurer will be entitled to avoid the contract for misrepresentation as in the previous provision if certain conditions are satisfied. Firstly, there must be a representation which means a precise statement which the insurer can rely on reasonably to enter the

turned the reinsurers’ attention to the more favourable period to the reassured. Waller J submitted that brokers are not required to teach reinsurers how to do their jobs as reinsurers should have examined the earlier claims period documents presented to them since they are usually the most important. However, they did not although they were presented to them. Such an approach was supported by the Court of Appeal and the majority of the House of Lords (*Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1993] 1 Lloyd’s Rep 496, [1994] 3 All ER581). Compare with *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd’s Rep IR 764, where it was found that disclosure made was insufficient. Incomplete disclosure can amount to positive misrepresentation; however, non-disclosure can be claimed even though it is not the situation. (In the case disclosing that the shipment contained clocks, it did not amount to disclosing in that it contained Rolex watches.)

¹²⁹³ See Ch 6 for more.

contract, and therefore mere puffs¹²⁹⁴ or implicit statements¹²⁹⁵ are not capable of incurring misrepresentations as they are not considered representations. Also a representation requires a positive step; however, non-disclosure can amount to a misrepresentation in certain situations¹²⁹⁶ including when the insurer asks an express question, as silence here in front of such a question can be construed as a negative answer,¹²⁹⁷ literally true statement but misleading.¹²⁹⁸ Also, for the insurer to avoid the contract, the representation must be a matter of fact.¹²⁹⁹ The MIA1906 states that a representation can be of a matter of fact, expectation or

¹²⁹⁴ *Allianz Via Assurance v Marchant* (unreported, 1997) (describing a business by saying that it is “very prestigious” was considered a puff and not a representation); *Clapham v Cologan* (1813) 3 Camp 381 (no representation that the ship is English because its name was English); It must be noted that such puffs are less in commercial transactions compared to general contracts. Differentiation between mere puffs and representations which are meant to make an effect on the other contracting party does exist in general contract law (See Ch 4 for more); See also *Limit No 2 Ltd v Axa Versicherung AG* [2007] EWHC 2321 (Comm), [2008] Lloyd’s Rep IR 330; Vague statements are usually not considered material or capable of inducing the insurer to the contract (*Crane v Hannover Ruckversicherungs-Aktiengesellschaft* [2008] EWHC 3165 (Comm), [2010] Lloyd’s Rep IR 93); That is similar to general contract law (See Ch 4 for more).

¹²⁹⁵ *Feasey v Sun Life Assurance Co of Canada* [2002] EWHC 868 (Comm), [2002] Lloyd’s Rep IR 807 ; *ERC Frankona Reinsurance v American National Insurance Co* [2005] EWHC 1381 (Comm), [2006] Lloyd’s Rep IR 157.

¹²⁹⁶ See *HIH Casualty & General Insurance v Chase Manhattan Bank* [2003] UKHL 6, [2003] Lloyd’s Rep IR 230.

¹²⁹⁷ *Roberts v Avon Insurance Co Ltd* [1956] 2 Lloyd’s Rep 240; *Roberts v Plaisted* [1989] 2 Lloyd’s Rep 341.

¹²⁹⁸ Especially if the question to the assured was clear and unambiguous; See for example: *Cazenove v British Equitable Assurance Co* (1859) 29 LJCP 160; *London Assurance Co v Mansel* (1879) 11 Ch D 363; *Condogianis v Guardian Assurance Co Ltd* [1921] 2 AC 125.

¹²⁹⁹ *Godfrey v Britannic Assurance Co Ltd* [1963] 2 Lloyd’s Rep 515.

belief.¹³⁰⁰ However, it later states that there will be no liability for the statements of belief or expectation as long as they are made in good faith.¹³⁰¹ Similar to general contract law,¹³⁰² the statement of belief here can be regarded as one of fact if the assured does not genuinely hold the belief at the time of the statement,¹³⁰³ and the decision of classifying the statement as one of belief or fact is rather difficult.¹³⁰⁴ Also a statement of expectation can be regarded as a

¹³⁰⁰ MIA1906, s 20(3); The statements of opinion or belief are statements where the person making them do not hold enough information about them to be certain that they are perfectly accurate (*Hubbard v Golver* (1812) 3 Camp 313 [314-15] (Ellenborough L))

¹³⁰¹ MIA1906, s 20(5); See : *John Wheelton, Lys Seagar and Charles Lane v Edward Brydges Hardisty, Jacob Bell and Walter Barker* (1857) 8 El & Bl 232 (for statements of belief), *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No2)* [2001] Lloyd's Rep IR 291 (for statements of expectation); On the issue of when the assured honestly holds the opinion, but there were no reasonable grounds for such opinion, recent cases show that honesty is sufficient in making the statement of belief, even though there may not be reasonable grounds for such belief (*Economides v Commercial Union Assurance Co Plc* [1997] 3 All ER 636 ; *Rendall v Combined Insurance Company of America* [2005] EWHC 678 (Comm), [2006] Lloyd's Rep IR 732 (Such objective test does not apply); *Zeller v British Caymanian Insurance Co Ltd* [2008] UKPC 4, [2008] Lloyd's Rep IR 545 (Honesty is enough)). Compare with *Bank Leumi Le Israel BM v British National Insurance Co* [1988] 1 Lloyd's Rep 71 [75] (Saville J). Such an approach is different from what is applied in general contract law where statements of belief can incur an actionable misrepresentation if there are reasonable grounds for the opinion creating an implied representation (H. Bennett, 'Statements of Fact and Statements of Opinion in Insurance Contract Law and General Contract Law' (1998) 61 MLR 886; *Brown v Raphael* [1958] Ch 636; See Ch 4).

¹³⁰² *Bisset v Wilkinson* [1927] AC 177.

¹³⁰³ *Economides v Commercial Union Assurance Co Plc* [1997] 3 All ER 636.

¹³⁰⁴ For example, see: *Life Association of Scotland v Forster* (1873) 11 M (Ct of Sess) 351 (statements by the assured in a life policy regards his health is construed as matters of belief) ; See also *Joel v Law Union & Crown Insurance Co* [1908] 2 KB 863; Compare with *Thomson v Weems* (1884) 9 App Cas 671 (a statement made by the assured about his habits was construed as a matter of fact) ; *Godfrey v Britannic Assurance Co Ltd* [1963] 2

matter of fact if the assured does not genuinely hold the expectation at the time of making the statement.¹³⁰⁵ In respect of statements of law, they are not capable of making a case of misrepresentation if they are false in the insurance context.¹³⁰⁶

Additionally, for the insurer to avoid the contract the statement must be untrue and the standard for the truth of the statement is set to be “*if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer*”.¹³⁰⁷ The decision on the truth of the statement can

Lloyds Rep 515 (failure to disclose a visit to the doctor is construed as a matter of fact which is material and must be disclosed although the assured was ignorant of anything serious wrong with him). The standard will be the impact of the used words on a prudent insurer (*Highland Insurance Co v Continental Insurance Co* [1987] 1 Lloyd’s Rep 109; *Crane v Hannover Ruckversicherungs-Aktiengesellschaft* [2008] EWHC 3165 (Comm), [2010] Lloyd’s Rep IR 93).

¹³⁰⁵ *Bowden v Vaughan* (1809) 10 East 415; *Highland Insurance v Continental Insurance* [1987] 1 Lloyd’s Rep 109.

¹³⁰⁶ Examples of statements of law in insurance contracts include those regarding the insurable interest (*Harse v Pearl Life Assurance Co* [1904] 1 K B 558); however, the situation of those statements relating to the construction of the policy or its limits is unclear (*Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co* [1920] 1 K B 257); It must be noted that the differentiation between statements of fact and law is hard in general contract law (See Ch 4 for more; See also *Kleinwort Benson v Lincoln City Council* [1998] UKHL 38, [1998] 4 All ER 513).

¹³⁰⁷ MIA1906, s 20(4); See *Sirius International Insurance Corp v Oriental Assurance Corp* [1999] Lloyd’s Rep IR 343 (a statement to the sprinkler’s installation was found to be untrue as the difference between the representation and the truth was material); compare with *Crane v Hannover Ruckversicherungs-Aktiengesellschaft* [2008] EWHC 3165 (Comm), [2010] Lloyd’s Rep IR 93; The standard will also be applied to literally true statements implying false information, and to partially true statements.

be hard ¹³⁰⁸ and the matter is considered within the customs applied for the trade in context.¹³⁰⁹ The approach of the courts generally seems to favour the assured by supporting the accuracy of his statements.¹³¹⁰ Other requirements for the misrepresentation to be actionable are that it must be made by the assured himself or someone authorised to act on his behalf in making statements, e.g. agent,¹³¹¹ and it must be material to a prudent insurer in his decision in entering the contract or fixing the premium.¹³¹² Also common law has added a requirement of inducement even though it is not included in the MIA1906.¹³¹³ It must be noted that the insurer will have the right to avoid if the misrepresentation was actionable disregarding the assured's state of mind, as there will be no difference between fraudulent, innocent, or negligent misrepresentations as regards his right of avoidance and that applies to non-disclosure.¹³¹⁴ Also there is no causation required between the loss and the non-disclosed or misrepresented fact as only materiality and inducement are required.¹³¹⁵

¹³⁰⁸ *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] Lloyd's Rep IR 131.

¹³⁰⁹ *Chaurand v Angerstein* (1791) Peake 61.

¹³¹⁰ *Friedlander v London Assurance Company* (1832) 1 Mood & R 171; *Wulfson v Switzerland General Insurance Co Ltd* (1940) 67 Ll L Rep 190; but compare with *Doe d Pitt v Laming* (1814) 4 Camp 73; *Barnett & Block v National Parcels Insurance Co Ltd* (1942) 73 Ll LR Rep 17.

¹³¹¹ *International Lottery Management Ltd v Dumas* [2002] Lloyd's Rep IR 237.

¹³¹² MIA1906, s 20(2); See below for more details on materiality under 5.7.

¹³¹³ *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER 581; See below for more details on inducement under 5.8.

¹³¹⁴ *Dennistoun v Lillie* (1821) 3 Bli 202; *Hamilton & Co v Eagle Star and British Dominions Insurance Co Ltd* (1924) 19 Ll L Rep 242; *Graham v Western Australian Insurance Co Ltd* (1931) 40 Ll LR 64 [66]. The difference in the assured's state of mind may be considered for other purposes, e.g. the return of premium to the

CIA2012 :

The position for consumer assureds has changed with the announcement of the CIA2012, where they will be subject to its provisions instead of the MIA1906 which will only apply to business assureds.¹³¹⁶ The main highlight of the CIA2012 is that the duty of disclosure is abolished and replaced with the duty to take reasonable care not to commit a misrepresentation.¹³¹⁷ Furthermore, only qualifying misrepresentation will entitle the insurer to a remedy against the consumer assured and this happens when:

“(a) the consumer makes the misrepresentation in breach of the duty set out in section 2(2), and

assured, as he will not be entitled to a return of premium when the insurer avoids the policy if he was fraudulent (MIA1906, s 84(1)); For more discussion on the matter see below under 5.6.

¹³¹⁵ *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER 581.

¹³¹⁶ Royal assent has been given to the CIA2012 on the 8th of March 2012, and it came into effect on the 6th of April 2012; See above under 5.1.

¹³¹⁷ CIA2012, s 2; See also CIA2012, s 11; It must be noted that the results of the distinction under the MIA1906 (which no longer applies to consumers) between statements of opinion, intention and fact for misrepresentation purposes can be reached similarly under the CIA2012. If the assured did not possess the intention or the opinion in the first place, he will be deemed not to have acted in reasonable care and therefore has made a misrepresentation provided inducement is satisfied (CIA212, ss 2, 4; see below). The difficulty in distinguishing between matters of fact and intention can be resolved by stipulating warranties for the future which if breached, the risk automatically will not attach. Using warranties to the future is still allowed by the CIA2012. On the issue of requiring reasonableness in holding the opinion (see above), the CIA2012 can be more on the insurer's side since it requires a standard of a reasonable consumer for the duty to take reasonable care not to misrepresent (CIA2012, ss 2(2), 3(3)) ; R. Merkin, *Colinvaux Law of Insurance* (9th edn, Sweet and Maxwell 2013) para 6-013-6-014.

(b) the insurer shows that without the misrepresentation, the insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms.”¹³¹⁸

The qualifying misrepresentation can be deliberate or reckless, or careless, and remedies available to the insurer will differ accordingly.¹³¹⁹ However, the CIA2012 did not provide a definition for misrepresentation which is left to common law.¹³²⁰

The requirement of positive step is needed, but the CIA2012 provides that if the insurer asks the assured to confirm or alter any information which is given on a prior occasion and the assured did not do that, such conduct can amount to a misrepresentation.¹³²¹

The use of methods converting all the assured’s pre-contractual representations into the terms of the contract or warranties is not allowed by the CIA2012.¹³²² It must be noted that the CIA2012 amends the common law and the MIA1906 for consumer assureds regard the pre-contractual period, therefore the possible post-contractual period duties under the common law and the MIA1906 are left untouched.¹³²³

¹³¹⁸ CIA2012, s 4 (1).

¹³¹⁹ See CIA2012, s 5 for definitions of deliberate, reckless and negligent misrepresentation; See below for more explanation under 5.6.

¹³²⁰ R. Merkin, *Colinvaux Law of Insurance* (9th edn, Sweet and Maxwell 2013) para 6-007A.

¹³²¹ CIA2012, s 2(3); That can be imagined when renewing the policy for example; such position is similar to common law (See Ch 4).

¹³²² CIA2012, s 6; Therefore the law on warranties is not relevant, and misrepresentation will be treated according to the CIA2012 which will provide the remedies.

¹³²³ R. Merkin, *Colinvaux Law of Insurance* (9th edn, Sweet and Maxwell 2013) para 6-002A.

LCCP2012:

As for business assureds, in contrast with the CIA2012, the LCCP 2012 suggests retaining the duty of disclosure, before concluding the contract as a default rule, and disclosure will include every material information providing a fair presentation of the risk which the assured actually knows or ought to know.¹³²⁴ After such disclosure of information, the insurer must promptly ask further questions, which a reasonable careful insurer will ask the assured. If the insurer fails to do so, he will not be allowed to any remedies related to the information that could have been revealed by those further questions,¹³²⁵ and the LCCP2012 suggests making such an approach statutory rather than having it only included within the waiver doctrine.¹³²⁶ It is worth noting that the LCCP2012 suggests leaving the remaining aspects of waiver to courts, and therefore keeping section 18 (3) (c) of the MIA1906 regarding information waived by the insurer which need not to be disclosed as it is.¹³²⁷

For matters which need not to be disclosed unless the insurer asks about them, the LCCP2012 suggests modifying section 18(3) (b) regarding the matters which the insurer is presumed to have knowledge about, to include common knowledge matters,¹³²⁸ common trade risks which are supposed to be known by a careful insurer,¹³²⁹ matters which are already known to the

¹³²⁴ LCCP2012 paras 5.68–5.77.

¹³²⁵ Ibid. Those enquiries must correspond to the nature of the business insurance, its category and complication. (See below under 5.6, 5.7 for more details).

¹³²⁶ Ibid.

¹³²⁷ Ibid 5.77.

¹³²⁸ Ibid 8.44.

¹³²⁹ Ibid 8.45.

insurer meaning the “*directing mind and will of the insurer*” and the one making the underwriting decision.¹³³⁰ The LCCP2012 does not suggest amendments regarding the other matters in section 18 of the MIA1906 which do not need to be disclosed.

In respect of misrepresentation, the LCCP 2012 suggests that material representations which the business assured know about or ought to know about must always be true, while other representations are required to be concluded in good faith. Such a test of knowledge will be similar to the one in section 18 of the MIA1906, rather than differentiating between matters of fact, and matters of belief or expectation in section 20 of the MIA1906.¹³³¹ Also, the LCCP 2012 differentiates between dishonest and non-dishonest conducts for both non-disclosure and misrepresentation.¹³³² Different remedies are suggested depending on the honesty of the business assured.¹³³³ In the draft clauses of the forthcoming Insurance Contract Law Draft Bill recently issued by the Law Commissions, most of the LCCP2012 proposals are incorporated.¹³³⁴ However, the duty of disclosure and representation is included under the duty to ‘make a fair presentation of the risk’ and it applies only to non-consumer insurance.¹³³⁵ Specifically, the Draft Bill in part 2 which applies to non-consumer

¹³³⁰ Ibid 8.46.

¹³³¹ Ibid, 6.91–6.94 (for more details see below under 5.6).

¹³³² Ibid, 9.1-9.77; for more on definitions see below under 5.6.

¹³³³ Ibid; for more on remedies see Ch 7.

¹³³⁴ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

¹³³⁵ Insurance Contract Law Draft Bill, cls 2, 3, 4.

insurance,¹³³⁶ states that it is a duty on the proposer,¹³³⁷ before the insurance contract or variation to make a fair presentation to the risk,¹³³⁸ which can be in a document/s or orally,¹³³⁹ and such duty is:¹³⁴⁰

(a) which discloses every material circumstance which the proposer knows or ought to know, or (taking the information provided by the proposer in the round) gives the insurer sufficient information, in relation to those material circumstances, to put a prudent insurer on notice that it needs to make further inquiries [as to circumstances which may prove material],

(b) which makes that disclosure in a manner which would be reasonably clear and accessible to a prudent insurer, and

*(c) in which every material representation as to something the proposer knows or ought to know is substantially correct; or, if as to something else (such as a matter of expectation or belief), is made in good faith.*¹³⁴¹

Hence, the above duty basically contains three main elements, namely: what the proposer should disclose, the presentation of information disclosed, and a requirement of truth for material representations.¹³⁴² The duty to make a fair presentation of the risk above will

¹³³⁶ Ibid, cl 2(1).

¹³³⁷ Ibid, cl 1, for definition of the proposer.

¹³³⁸ Ibid, cl 2, 3, 4.

¹³³⁹ Ibid, cl 4(3).

¹³⁴⁰ The content of the duty is embedded in the Insurance Contract Law Draft Bill, cl 4(1).

¹³⁴¹ Ibid.

¹³⁴² Ibid; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in

substitute sections 18, 19, and 20 of the MIA1906. It also allows active rather than passive underwriting with insurers involved in the disclosure and fair presentation of the risk process by asking questions.¹³⁴³ Even when the proposer does not disclose material information, but makes a satisfying disclosure alerting a reasonable insurer to ask questions which would reveal such material information when answered, that would be sufficient for the duty to be fulfilled.¹³⁴⁴ The second element is regard the presentation of the information disclosed, which will have an impact on diminishing lengthy and complex presentations of information disclosed by the proposer, where large information can be dumbed in front of the insurer, and which was allowed under the MIA1906.¹³⁴⁵ The third element which is in respect of material representations will have an effect on reducing the difference between non-disclosure and misrepresentation by having the same standard for material disclosed information and

<http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014 , para 2. 19.

¹³⁴³ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) para 2.25.

¹³⁴⁴ Insurance Contract Law Draft Bill, cl 4(1)(a); The Law Commission And Scottish Law Commission , *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) para 2.24; This is already followed by courts, for example in *Container Transport International Inc v Oceanus Mutual Underwriting Association Bermuda Ltd* [1984] 1 Lloyd's Rep 476 ; *Garnat Trading & Shipping (Singapore) Pte Ltd and Another v Baominh Insurance Corporation* [2011] EWCA Civ 773, [2011] 2 Lloyd's Rep 492.

¹³⁴⁵ Insurance Contract Law Draft Bill, cl 4(1)(b); Whether the presentation of information is accessible or not to a prudent insurer is a matter of fact in every case and it will depend on the relevant circumstances, for example, it can be acceptable if the non-consumer proposer disclosed large amount of information, but the material issues were emphasised; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) paras 2.27-2.29.

material representations, namely: “*what the proposer knows or ought to know*”.¹³⁴⁶ The standard for the material representation to be substantially correct is similar to the MIA1906,¹³⁴⁷ as it is set to be where the difference between the representation and what is actually correct is not considered material by a prudent or reasonable insurer.¹³⁴⁸ The non-consumer proposer will not guarantee that the statements are true for something beyond his knowledge which is a change from the previous position.¹³⁴⁹ The non-consumer proposer has the right before entering the contract to withdraw his representation or correct it.¹³⁵⁰

It must be noted that like the position for consumer insurance,¹³⁵¹ the draft Bill states that for non-consumer insurance, using the basis of the contract clauses or any method to convert all pre-contractual statements into warranties is forbidden.¹³⁵² Thus, the pre-contractual statements will be treated as representations and the rules above will apply accordingly.¹³⁵³

¹³⁴⁶ Insurance Contract Law Draft Bill, cl 4(1)(c); The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) paras 2.30-2.34, see *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 [594] (Mustill L); The standard was different between disclosure and misrepresentation under the MIA1906, ss18, 20.

¹³⁴⁷ MIA1906, s 20(4).

¹³⁴⁸ Insurance Contract Law Draft Bill, cl 4(7).

¹³⁴⁹ *Ibid*, cl 4(1)(c), MIA1906, s 20.

¹³⁵⁰ Insurance Contract Law Draft Bill, cl 4(8).

¹³⁵¹ CIA2012, s 6.

¹³⁵² Insurance Contract Law Draft Bill, cl 8.

¹³⁵³ *Butler and Merkin's Reinsurance Law*.

For matters which need not to be disclosed by the non-consumer proposer when the insurer does not ask any questions regarding them, the draft Bill clarifies the meaning of: what is known to the insurer, and presumed to be known by the insurer which was not clarified enough under the MIA1906.¹³⁵⁴ It also clarifies another category of matters which need not to be disclosed, i.e. ought to be known to the insurer generally.¹³⁵⁵ It keeps circumstances decreasing the risk, waived by the insurer, and covered by a warranty as they are under the MIA1906.¹³⁵⁶

To be specific, the draft Bill puts matters which need not be disclosed under exceptions to make a fair presentation of the risk¹³⁵⁷ and such matters include: matters known to the insurer,¹³⁵⁸ matters which ought to be reasonably known by the insurer,¹³⁵⁹ and matters presumed to be known by the insurer.¹³⁶⁰ Additionally, the exceptions include matters decreasing the risk,¹³⁶¹ matters which the insurer waives,¹³⁶² or covered by a warranty whether express or implied, and therefore there will be no need to disclose them.¹³⁶³ It should

¹³⁵⁴ Insurance Contract Law Draft Bill, cls 6(2),6(4). such definitions will be discussed later under 5.6.

¹³⁵⁵ Ibid, cl 6(3).

¹³⁵⁶ Ibid, cl 6(1)(a), (e),(f), MIA1906, s 18(3)(c),(d).

¹³⁵⁷ Ibid, cl 6.

¹³⁵⁸ Ibid, cl 6(1)(b).

¹³⁵⁹ Ibid, cl 6(1)(c).

¹³⁶⁰ Ibid, cl 6(1)(d).

¹³⁶¹ Ibid, cl 6(1)(a).

¹³⁶² Ibid, cl 6(1)(e).

¹³⁶³ Ibid, cl 6(1)(f).

be noted that the draft Bill incorporates dishonest conduct in the LCCP2012, as deliberate or reckless breaches to the duty to make a fair presentation of the risk, while non-dishonest conduct is incorporated as neither deliberate nor reckless breaches, where different remedies will apply to each.¹³⁶⁴

ICOBS:

Regarding disclosure by the insurer or the intermediary, the ICOBS contains numerous disclosure requirements imposed on insurance companies and insurance mediation companies when dealing with their customers.¹³⁶⁵ The insurance intermediary status must be disclosed to the client including information about itself, the complaints process, and its fees before concluding the insurance contracts, and upon any amendments or renewals.¹³⁶⁶ Also, the insurer or the intermediary must ensure that the commercial customer knows what type of information must be disclosed, and that can be by explaining the disclosure duty of material information, and the consequences of failing to disclose, as well as by asking clear questions of material information to the insurance contract.¹³⁶⁷ For consumers, the insurer or the intermediary has to explain the duty to take reasonable care not to misrepresent and the results of being negligent, deliberate or reckless in making a misrepresentation.¹³⁶⁸ Also he

¹³⁶⁴ Ibid , cl 7.

¹³⁶⁵ See below; The rules apply to insurers and insurance intermediaries, see ICOBS 1.1.1; for more detailed disclosure duties on the intermediaries, see Ch 6.

¹³⁶⁶ ICOBS 4.1; See also Ch 6 for details on intermediaries.

¹³⁶⁷ ICOBS 5.1.4.

¹³⁶⁸ Ibid.

has to ask clear and unambiguous questions to customers on the matters relevant to the insurance contract or the variation.¹³⁶⁹

A general highlight of the ICOBS is that it requires a high level of product disclosure from the insurer and the intermediary.¹³⁷⁰ In fact, insurers and intermediaries must take steps before and after concluding the insurance contracts and during renewals and midterm changes ensuring that the customer possesses suitable information in a good time about the policy and its price, facilitating informed decisions.¹³⁷¹ Moreover, in general insurance contracts, the insurer or the intermediary must reveal to the customer the applicable law and the measures that can be taken in the event of a complaint.¹³⁷² They must also disclose before concluding the insurance contract to consumers their right to cancel the policy with details including its conditions, duration, payment requirements, and the results of not using the right.¹³⁷³ The ICOBS stresses the importance of price disclosure as well, where it requires the insurers and the intermediaries to disclose to consumers the price of the premium independently, if the policy was sold as part of other goods or services and if the policy is compulsory to such goods or services.¹³⁷⁴ Another important aspect of disclosure is the disclosure of fees and

¹³⁶⁹ Ibid.

¹³⁷⁰ ICOBS 6.1.5–6.1.10; See also Ch 6 for more details on intermediaries.

¹³⁷¹ Ibid.

¹³⁷² ICOBS 6.2.2.

¹³⁷³ ICOBS 6.2.5.

¹³⁷⁴ ICOBS 6.1.13; For more details on intermediaries see Ch 6.

commissions by the intermediaries.¹³⁷⁵ The ICOBS requires fees disclosure by the intermediaries to all customers;¹³⁷⁶ however, it does not provide the same level of transparency for commissions, as they are only disclosed upon request and only to commercial customers.¹³⁷⁷ Regarding misrepresentation by insurers or intermediaries, the ICOBS provides that insurers or intermediaries must be fair, clear and not misleading when communicating with their customers including financial promotions, where also reasonable steps must be taken to ensure such fairness and clarity.¹³⁷⁸

II Saudi Insurance Law

Disclosure:

In respect of Saudi insurance laws, it can be noticed that, unlike the CIA2012 and similar to the MIA1906, disclosure by the assured is still required but for both businesses and consumers before concluding the insurance; however, unlike the MIA1906, it is subject to a reasonable expectations test.¹³⁷⁹ Therefore the assured must disclose fully and honestly all relevant information according to a reasonable person which is needed for the insurance and to underwrite the risk.¹³⁸⁰ The insurer or the intermediary¹³⁸¹ before concluding the contract

¹³⁷⁵ See below; For more details on intermediaries see Ch 6.

¹³⁷⁶ ICOBS 4.3.

¹³⁷⁷ ICOBS 4.4.

¹³⁷⁸ ICOBS 2.2.

¹³⁷⁹ Art 42 IMCOCR2008.

¹³⁸⁰ Ibid.

has to inform the assureds of their key duties under the policy including the aforementioned disclosure duty, along with paying the premium in time.¹³⁸²

However, regarding disclosure by the insurer or the intermediary, Saudi insurance laws are more in line with English insurance laws and the ICOBS requirements. Disclosure by the insurer and the intermediary is highlighted throughout the IMCOCR2008. Similar to the ICOBS insurers or intermediaries¹³⁸³ are required by the IMCOCR2008 to inform the assureds of their duty in disclosure as seen earlier.¹³⁸⁴ This informing requirement is also mentioned by another article in the IMCOCR2008 where it was stressed that the insurer or the intermediary must inform the assureds about their duty of disclosure of relevant and accurate information at every stage of the contract (application stage, renewals and claims stage).¹³⁸⁵

Additionally, insurers or intermediaries must disclose all relevant information to customers in a timely, clear, and accurate manner, enabling them to make informed decisions, and they must ensure that such information is available to the customers in writing.¹³⁸⁶ It is interesting to note that, unlike the ICOBS where such disclosure and communication comes under the

¹³⁸¹ It must be noted that the duties under the IMCOCR2008 apply to other insurance-related services providers besides the intermediary including advisors, claim handling professionals, and loss adjusters. However, for brevity, in the text reference will be to insurance intermediaries.

¹³⁸² Ibid.

¹³⁸³ For more detailed explanation on the intermediaries duties, see Ch 6.

¹³⁸⁴ Art 42 IMCOCR2008 (See above); ICOBS 5.1.4.

¹³⁸⁵ Art 32 IMCOCR2008; See also ICOBS 5.1.4.

¹³⁸⁶ Art 15 & 16 IMCOCR2008; See also ICOBS 6.1.5- ICOBS 6.1.10.

umbrella of product disclosure relating to the policy,¹³⁸⁷ such disclosure in the IMCOCR2008 comes as a general duty. Hence, it can include any relevant information supporting informed decisions, not necessarily in respect of the product sold.¹³⁸⁸ This approach is an evidence of the increased disclosure obligations on the insurer, and reflects a clear inclination in the regulation to protect the assured as the weak party in the contract.

The minimum information disclosed is further elaborated later in the regulation. This includes the legal nature of the company, whether it is an insurer itself, or acting on behalf of the insurer, or acting on behalf of the assured.¹³⁸⁹ Also, any abnormal financial relationship between the broker and the insurer (other than the usual commissions) which includes shared ownership, and the nature and the scope of the services and products that the insurer delivers.¹³⁹⁰

As regards the advice to customers, the insurer or the intermediary must ensure his advice addresses the needs of the assured, and that the assured has enough information facilitating informed decisions for the service or product which he wants to buy, which may be by explaining how the service addresses his needs and the differences between other choices.¹³⁹¹ Further, before accepting the insurance contract, the insurer must disclose the main conditions

¹³⁸⁷ ICOBS 6.1.

¹³⁸⁸ The IMCOCR2008 in addition to such general duty provides later in the regulation details of disclosure duties as regards the product and services sold before the conclusion of the contract (See Art 33, 34, 37 IMCOCR2008; See below for more details).

¹³⁸⁹ Art 30 IMCOCR2008.

¹³⁹⁰ Ibid.

¹³⁹¹ Art 33, 34 IMCOCR2008.

of the product sold upon request from the assureds,¹³⁹² such as claims and complaints handling measures, obligations of the parties, costs of the policy, exclusions and benefits, cancellation rights and conditions, renewal dates, any unusual condition which may harm the customer, and any policy condition which entitles the insurer for changes after the policy starts.¹³⁹³

Another aspect of disclosure by the insurer and the intermediary in the IMCOCR2008, is the disclosure of any conflict of interest to the assured to ensure balance and fairness between the parties, besides the reasonable steps which must be taken to address such conflict to ensure fairness.¹³⁹⁴ In English law, the ICOBS requires insurers and intermediaries to manage any conflict of interest in a fair manner as regards claims handling, including accepting inducements.¹³⁹⁵ However, the Senior Management Arrangements, Systems and Controls (SYSC)¹³⁹⁶ provides a general conflict of interest provision which can be applicable generally on insurers and insurance intermediaries and widen the scope of the conflict of interest.¹³⁹⁷ The SYSC provides that any conflict of interest must be managed effectively and reasonable steps must be taken to prevent it from making any potential material harm to the

¹³⁹² Art 37 IMCOCR2008.

¹³⁹³ Ibid; See also ICOBS 6.1.5-6.1.10 (disclosure duty relating to the policy facilitating informed decisions including pre- and post-contractual period, renewals and midterm changes); ICOBS 6.2.5. (disclosing cancellation rights to consumers before concluding the insurance contract) (See above).

¹³⁹⁴ Art 19 IMCOCR2008.

¹³⁹⁵ ICOBS 2.3.1.; 8.3.3.

¹³⁹⁶ The FCA Handbook, Senior Management Arrangements, Systems and Controls (SYSC)

¹³⁹⁷ SYSC 10.1.1 , 10.1.3.

customer.¹³⁹⁸ Disclosure of such conflict must be provided, only if such steps were not enough to ensure such prevention of harm, and that will be before undertaking the customer's business.¹³⁹⁹

In this author's view, the Saudi approach is more favourable since it places the customer in the picture from the beginning as it requires that as soon as there is a conflict, it must be disclosed disregarding the measures taken by the insurer. However, the English position is less strict as such disclosure will come only if the measures to manage the conflict were not enough in preventing the risk of harm to the customer.

The disclosure of the conflict of interest to the assured provides him with the opportunity to evaluate whether the insurer has really managed this conflict of interest or not. It seems rather unfair for the assureds to be ignorant of the fact that such insurers or intermediaries are gaining considerable benefits from selling them a policy which jeopardises their integrity in seeking what is in the best interest for them as customers. It must be borne in mind that those assureds are required to disclose every material circumstance and answer all questions asked by the insurers which can have an effect on the decision of accepting the risk. Hence, it is only fair for them to get this kind of disclosure in return.

Regarding fees and commissions, the IMCOCR2008 provides that intermediaries and insurance service providers must disclose all fees and commissions to all types of assureds whether consumers or businesses from all sources.¹⁴⁰⁰ Accordingly, compared to the ICOBS, which provides this level of disclosure for fees but not for commissions which are only

¹³⁹⁸ SYSC 10.1.7.

¹³⁹⁹ SYSC 10.1.8.

¹⁴⁰⁰ Art 40 IMCOCR2008.

disclosed to commercial customers upon request,¹⁴⁰¹ the IMCOCR2008 seems to be yet again more inclined towards an assured-friendly approach which provides a high level of clarity. The author favours this high level of transparency, especially regarding commissions which can have an effect on the intermediary's advice, performance, or direction of sale. In fact, such disclosure illustrates the conflict of interest disclosure which is already required by the IMCOCR2008.¹⁴⁰² It is rather strange that such a disclosure is only allowed for commercial customers in English insurance law, as consumers are in a much more vulnerable position, which entitles them to more protection. Commercial customers, especially big businesses, may be able to know such information even if it is not provided by the ICOBS.

¹⁴⁰¹ ICOBS 4.3, 4.4.

¹⁴⁰² Art 19 IMCOCR2008.

Misrepresentation:

In respect of misrepresentation, there is nothing in the IMCOCR2008 that is directed particularly to misrepresentation, as it seems that all sections are concerned with disclosure. The only indication of misrepresentation in the IMCOCR2008 is embedded in section B, which concerns advertising and promotion. The section requires honest representation from insurers and intermediaries towards all the potential assureds when advertising or promoting products, which is similar to ICOBS 2.2. This is interesting in the sense that refraining from misrepresentation is usually connected to the assured in the pre-contractual period of the contract. Nonetheless, an implied duty of honest representation by the insurer can be included in the general requirement section where a general duty of honesty and transparency is required.¹⁴⁰³ However, that section is directed to insurers and insurance intermediaries and not to the assureds. For misrepresentations committed by assureds, the only indication is found in Art 45 of the AFR2008 which numerates some non-exhaustive examples of pre- and post-contractual fraud committed by the assured or/ and third parties. For the pre-contractual fraud, the article provides an example of non-disclosing or giving false information about the assured's personal or background information. For the post- contractual fraud, the article provides that in the claims stage, fraud can include: purely fraudulent claims where the loss or damage itself is false, exaggerated loss, and misrepresenting some facts to make the claim be within the ambit of the policy.¹⁴⁰⁴

¹⁴⁰³ See Art 11 IMCOCR2008.

¹⁴⁰⁴ Art 45 AFR2008 provides *"Policyholder fraud is committed by policyholders and/or third parties mainly at the policy setup and claims management stages of the client relationship. Consequently, companies should design and implement procedures to combat the main types of policyholder fraud, which include but are not limited to:*

- a) At the policy setup stage: withholding or providing incorrect personal or background information.*
- b) At the claims filing stage: :*

In other aspects, the AFR2008 provides misrepresentation and non-disclosure as examples of fraud provided they are deliberate, as Art 5 provides:

“Insurance fraud is defined as ... This may, for example, be achieved

By means of... b) deliberately misrepresenting, concealing, suppressing or not disclosing one or more material facts relevant to a financial decision, transaction or perception of the insurer’s status.”

The fraud definition and the examples are general, which gives the impression that they include deliberate misrepresentation and non-disclosure by parties other than the assured, such as the insurer or one of its employees, or the intermediary, and they can include the pre- and post-contractual stage as well.¹⁴⁰⁵ It must be noted that there were no indications of negligent or innocent misrepresentations or non-disclosure.¹⁴⁰⁶ However, the AFR2008 by stressing fraudulent misrepresentation and non-disclosure seems to distinguish between fraudulent non-disclosure and misrepresentation and non-fraudulent non-disclosure and misrepresentation, even the remedies are not clear.¹⁴⁰⁷ In fact the distinction can be more general to include any fraudulent or dishonest conduct by the insurer or the assured aiming for an unlawful advantage as misrepresentation and non-disclosure are provided as non-

-
- i. Submitting claims for pretended damage or loss.*
 - ii. Misrepresenting facts to include the claim in the coverage.*
 - iii. Overstating cost of damage.”*

¹⁴⁰⁵ Art 5, 45 AFR2008.

¹⁴⁰⁶ See below under 5.6 for more details.

¹⁴⁰⁷ Art 5, 45 AFR2008.

exhaustive examples.¹⁴⁰⁸ The IVDRC in practice confirms that it considers the assured's state of mind, and whether he is innocent or not when committing a breach of good faith which includes non-disclosure and misrepresentation and that will affect the remedies accordingly.¹⁴⁰⁹

5.3.1 Disclosure Of The Obligation To Disclose?

The IMCOCR2008 provides a duty on the insurer to inform the assureds of their obligation in disclosure prior to entering the insurance contract as seen earlier.¹⁴¹⁰ This duty is similar to what is embedded in the ICOBS¹⁴¹¹. In the author's opinion, such a position in Saudi insurance law is advisable and encouraged for the following grounds:

I Logical Result Opposed To The Insurers' Obligation To Explain The Duty Of Disclosure If They Refuse A Claim Based On Non-Disclosure After Concluding The Insurance Contract

Usually when the assured makes a claim, the insurer will investigate it to revise its validity and to confirm whether it is covered by the policy. If the insurer finds that the claim is not valid, for instance because of non-disclosure by the assured, then he owes a duty to explain to

¹⁴⁰⁸ Art 5 AFR20008.

¹⁴⁰⁹ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013); See below under 5.6 for more details.

¹⁴¹⁰ Art 32, 42 IMCOCR2008.

¹⁴¹¹ ICOBS 5.1.4; However, it is not indicated that it must be before entering the contract; such provision can be seen in other jurisdictions, e.g. Australian Insurance Contracts Act (Cth) 1984, s 22.

the assured why he will not fulfill his obligation to pay for the claim.¹⁴¹² This means that eventually the insurer will explain that the assured has a duty to disclose, explain the nature of the duty, and explain the relevant facts that have not been disclosed and their effect on the policy. In this sense, providing this explanation by the insurer at a prior stage “prior to concluding the contract” seems logical and fairer to the assured. The assured deserves such an explanation before entering the contract to be able to comply with it and to avoid exploiting his ignorance.

II Part Of The Insurer’s Duty To Act Honestly, Transparently And In A Fair Manner Or ‘Good Faith’

Saudi insurance law provides this general duty on all the insurers’ and insurance intermediaries’ actions in article 11 of the IMCOCR2008. If the insurer exploits the assureds’ ignorance regarding their duty to disclose material facts, then he will be violating this honesty and fairness. Moreover, obliging insurers and intermediaries to disclose the duty of the assureds in disclosure goes along with the Saudi general contract law principles deriving from Islamic law which recognises observing good faith in all transactions.¹⁴¹³

III Protecting Assureds From Misconceptions And Safeguarding Their Reasonable Expectations

As Saudi insurance law takes the reasonable expectations of the assured as a measure to test materiality,¹⁴¹⁴ it is clear that it places those reasonable expectations as a priority. Hence, it is only logical to include this warning requirement on the insurer. An assured who innocently may not know about a disclosure duty, or thinks that he has fulfilled it by answering the

¹⁴¹² This also provided by Art 52(2) IMCOCR2008.

¹⁴¹³ See Ch 4.

¹⁴¹⁴ Art 42 IMCOCR2008; See below under 5.7 for more details on the materiality test.

questions in the proposal form honestly, will reasonably expect to be covered under the policy. If the insurer refuses to pay the claim based on non-disclosure, without even warning the assured before the contract is concluded, he will be infringing the assured's reasonable expectations to mitigate his financial loss, which is not acceptable. It must be kept in mind that the way insurance is advertised and promoted today always gives the assured the impression that he will be covered. This impression of trustworthiness created by the insurers in the minds of the assureds will imply that they will be obliged to inform him of his duty to disclose. Accordingly, concealing the obligation of disclosure from the assured will unfairly take advantage of his vulnerable position and will defy his reasonable expectations of cover.

IV Uniqueness Of The Duty Of Disclosure In Insurance Law

It may be argued that since non-disclosure by both parties in the contract can be considered a type of fraud in Islamic general contract law,¹⁴¹⁵ no need to bring the duty to disclose to the attention of the assured.¹⁴¹⁶ Nonetheless, this argument can be easily refuted. Disclosure in insurance contract law has a distinct meaning not found in any other contract. It must be kept in mind that Islamic law principles mainly derive from the sale contract.¹⁴¹⁷ Disclosure in the sale contract mainly relates to disclosing any defect in the subject matter sold to the buyer.¹⁴¹⁸ This concept of disclosure is very narrow from an insurance contract perspective, and only

¹⁴¹⁵ In Islamic law, any defects in the subject matter must be disclosed. Disregarding defects, a general disclosure duty is evident only in certain contracts, e.g. *istisral* sales. However, good faith must be observed in all aspects of the transactions, and therefore if non-disclosure was in bad faith, liability will incur; See Ch 4.

¹⁴¹⁶ See Ch 4; S. Ryaner, *The Theory of Contracts in Islamic Law* (Arab and Islamic Laws Series, Graham and Tortman 1991) 231.

¹⁴¹⁷ See Ch 4.

¹⁴¹⁸ *Ibid.*

covers one aspect of insurance disclosure, i.e. the physical hazard, where the insured must disclose all relevant facts of the subject matter insured. On the other hand, disclosure under insurance contracts includes disclosure regarding many aspects such as moral hazards, insurance history etc. which all help in the risk assessment process. Hence, it is more complicated than its meaning under Islamic contract law or the sale contract.

Based on the above mentioned, the author does not only appreciate the Saudi insurance law approach in informing the assured of his duty of disclosure¹⁴¹⁹, but also suggests that the nature of that disclosure, its elements, and its effects and consequences on the policy must be fully explained by the insurer or the intermediary as in the ICOBS.¹⁴²⁰ It must be remembered that this concept of disclosure is new to the assured and can be easily misunderstood and difficult to comprehend. This applies to English law, although to a larger extent. The reason is that English law does not recognise a duty of disclosure in general contract law¹⁴²¹, and consequently the assured will have no clue whatsoever about his duty to disclose, or about its effects or nature.

¹⁴¹⁹ Art 32, 42 IMCOCR2008.

¹⁴²⁰ ICOBS 5.1.4.

¹⁴²¹ See Ch 4.

5.4 SOURCE AND LEGAL NATURE

I English Insurance Law:

There were various judicial discussions on the source of the duty of good faith in English insurance law, and on whether it has an extra-contractual impact or it comes as an implied term in insurance contracts.¹⁴²² As far as the pre-contractual duty is concerned, the matter is settled as it was held by the Court of Appeal in *Financière de La Cité SA v Westgate Insurance Co Ltd*,¹⁴²³ that the duty is extra-contractual deriving from a rule of law. This approach was confirmed by the House of Lords in the *Pan Atlantic insurance Co Ltd v Pine Top Insurance Co Ltd*¹⁴²⁴ and the *Star Sea*.¹⁴²⁵ One of the justifications for classifying the duty as coming from a rule of law and not as an implied term is that the only remedy is avoidance, and damages are not available as an additional or alternative remedy.¹⁴²⁶ There is no doubt that the principles in the MIA1906, apply to marine and non-marine insurance.¹⁴²⁷ As for the post-contractual duty of good faith the situation is not very clear as will be

¹⁴²² Most of the cases were against the implied term (*Merchants' & Manufacturers' Insurance v Hunt* [1941] 1 KB 295 [313] (Scott LJ); *March Cabaret Club and Casino v London Assurance* [1975] 1 Lloyd's Rep 169 [175] (May J); Compare with *Moens v Heyworth* (1842) 10 M & W 147 [157] (Parker B).

¹⁴²³ *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947.

¹⁴²⁴ *Pan Atlantic insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581.

¹⁴²⁵ *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469.

¹⁴²⁶ See *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952; [1990] 2 All ER 947; *Pan Atlantic insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581; *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469.

¹⁴²⁷ *Manifest Shipping Co Ltd v Uni-Polaris insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469.

explained later.¹⁴²⁸

II Saudi Insurance Law:

Similarly the duty of good faith in Saudi Insurance law originally derives from *Sharia'a* law.¹⁴²⁹ It can be described as a pre-contractual duty which determines the validity of the contract or the validity of the parties' consent in particular.¹⁴³⁰ If this duty is not observed in the contract, for example by deliberate concealment or misrepresentation by one of the parties¹⁴³¹, then the consent will be vitiated and the contract voidable by the party whose consent is vitiated.¹⁴³² The absence of good faith in the insurance contract or any other contract forms an impediment to consent which is a major pillar in the contract and its legality.¹⁴³³ Hence, it is evident that good faith is not a term in the contract, and its breach is not considered a breach of a contractual liability. Instead it is a prerequisite of the contract, with its breach affecting the validity of the contract.

¹⁴²⁸ See below under 5.9 for more details on this point.

¹⁴²⁹ *Sharia'a* law provides that good faith must be observed at all times between the parties, See Ch 4 for more details.

¹⁴³⁰ See Ch 4 for details.

¹⁴³¹ Types of fraud in both Islamic law and Saudi insurance law; See Art 5, 45 AFR2008.

¹⁴³² See Ch 4.

¹⁴³³ Ibid.

5.5 MUTUALITY

I English Insurance Law:

As stated earlier, the CIA2012 which applies to consumer insurance removed any rule of law regarding the duty of good faith in section 17 of the MIA1906 and the duty of disclosure, and replaced it with the duty to take reasonable care not to make a misrepresentation.¹⁴³⁴ Hence, the discussion in this section will concern the MIA1906 which still applies to business insurance.

The mutuality of the duty of good faith on both the insurer and the assured as parties of the insurance contract is stressed in section 17 of the MIA1906. For example, if the insurer already knows that an insured ship has arrived, while it is unknown to the assured, he will be in breach of his duty of good faith and if the assured avoided the contract the premiums generally must be returned.¹⁴³⁵ Mutuality was introduced even before the MIA1906 codification; nonetheless, since the only remedy of breach is avoidance, it was not of huge benefit to the assured, as it was for the insurer.¹⁴³⁶ If the insured risk happens while the insurer is in breach of his duty of good faith, the assured usually opts to be compensated for the loss suffered, rather than the return of his premiums. However, unlike the general law of contract, which allows damages as a remedy if there is a misrepresentation¹⁴³⁷, avoidance in English insurance law is still the only remedy for the business assured under the MIA1906, making the insurer's duty of good faith meaningless and without any benefit for the

¹⁴³⁴ CIA2012, ss 2, 11.

¹⁴³⁵ *Carter v Boehm* (1766) 3 Burr 1905 (Mansfield L).

¹⁴³⁶ *Carter v Boehm* (1766) 3 Burr 1905.

¹⁴³⁷ See Ch 4.

assured.¹⁴³⁸ The first decided case on the insurer's duty of good faith was *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd*,¹⁴³⁹ which was supported later in *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd*¹⁴⁴⁰ by the Court of Appeal and the House of Lords.

As for the materiality test set for the insurer, it must be noted that sections 18 and 19 of the MIA1906 concern the assured's test of materiality and not the insurer.¹⁴⁴¹ There are indications in *Carter v Boehm*¹⁴⁴² that materiality of information will be assessed in a way similar to the assured's duty¹⁴⁴³ and it can include information decreasing the risk for the assured.¹⁴⁴⁴ The test of materiality for the insurer has been settled by the Court of Appeal in *La Banque Financière de la Cité SA v Westgate Insurance Co. Ltd*,¹⁴⁴⁵ where

¹⁴³⁸ See Ch 4, MIA1906, s 17; *Carter v Boehm* (1766) 3 Burr 1905 (Mansfield L); *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All E.R. 952; [1990] 2 All ER 947; See Ch7 for more on remedies.

¹⁴³⁹ [1987] 2 All ER 923.

¹⁴⁴⁰ [1989] 2 All ER 952, [1990] 2 All ER 947.

¹⁴⁴¹ The details of the assured's test of materiality will be considered below under 5.7.

¹⁴⁴² (1766) 3 Burr 1905.

¹⁴⁴³ For the materiality test of the assured's duty see below under 5.7.

¹⁴⁴⁴ See *Carter v Boehm* (1766) 3 Burr 1905 [1909] (Mansfield L) where it was stated after indicating that the insurer must be informed about information increasing the risk and not diminishing it.

"The policy would be equally void, against the underwriter, if he concealed; as, if he insured a ship on her voyage, which he privately knew to arrived, and an action would lie to recover the premium."

From the example, it can be said that disclosure by the insurer of material information includes information decreasing the risk for the assured.

*“the duty falling upon the insurer must at least extend to disclosing all facts known to him which are material either to the nature of the risk sought to be covered or the recoverability of a claim under the policy which a prudent insured would take into account in deciding whether or not to place the risk for which he seeks cover with that insurer.”*¹⁴⁴⁶

There is a recent suggestion in *Sherdley v Nordea Life and Pension SA*¹⁴⁴⁷ that the insurer could be breaching the duty of good faith if he amended the policy terms on a unilateral basis in the period between the negotiations and the conclusion of the contract.

II Saudi Insurance Law:

In respect of Saudi insurance laws, The IMCOCR2008 in article 11 places a general obligation on the insurers and the insurance-related services providers including insurance intermediaries to act in transparency and honesty and to be faithful to the assureds and fulfill their obligations under the relevant laws and regulations. This general obligation of honesty or what was concluded as ‘good faith’ is not followed by announcing a mutual, general obligation on the customer or the assured. This assured-friendly approach was justified earlier.¹⁴⁴⁸ However, another justification may be that although the IMCOCR2008 forms a

¹⁴⁴⁵ [1989] 2 All ER 952, 990; [1990] 2 All ER 947; The case concerned the materiality of the brokers’ fraud which the underwriters failed to disclose to the bank (assured); See also: *Norwich Union Life Insurance Society v Qureshi* [1999] Lloyd’s Rep IR 453; *Aldrich v Norwich Union Life Co Ltd*, *Norwich Union Life Co Ltd v Qureshi* [2000] Lloyd’s Rep IR 1.

¹⁴⁴⁶ *La Banque Financière de la Cite SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952; [1990] 2 All ER 947 [990].

¹⁴⁴⁷ [2012] EWCA Civ 88, [2012] 2 All ER (Comm) 725.

¹⁴⁴⁸ The approach was justified to regain the assureds’ confidence in the market after the chaotic situation before the LSCIC2003; See Ch 3 for more.

valuable guidance regarding the relationship between the assured and the insurer; it is more of a guide to the insurers and the insurance related service providers' conduct, than a purely insurance contract law.

In any event, this omission of a general duty of good faith on the assured does not mean that Saudi insurance law encourages assureds to act in bad faith. As evidence, the IMCOCR2008 in article 42 places an obligation on the assured to disclose all relevant facts to the insurer. Moreover, in the AFR2008, fraudulent misrepresentations and concealments by the assureds are forbidden.¹⁴⁴⁹ The IVDRC also confirms that a non-innocent breach of good faith by the assured vitiates the contractual relationship and that good faith is required from the assured.¹⁴⁵⁰ Also, it must be remembered that good faith from both parties is demanded in general contract law in the first place.¹⁴⁵¹

Nonetheless, it is the author's opinion that a general duty of good faith on the assured should be included in the IMCOCR2008, just as it is with insurers and the intermediaries. First of all, a general duty of honesty and transparency is already stressed in article 11 of the IMCOCR2008 on the insurer and the intermediaries which makes it rather unfair not to stress it on the assured as well. Another reason for this suggestion is that even though a general duty of good faith is already required in general contract law, a general requirement in the IMCOCR2008 can confirm such an approach and can be useful as an added protection to easily facilitate catching incidents of bad faith by the assured in a direct manner, and which can survive the materiality test determining the facts that need disclosure. In other words, this general obligation can directly cover up any existing gaps in the present materiality test of

¹⁴⁴⁹ See Art 45 AFR2008.

¹⁴⁵⁰ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

¹⁴⁵¹ See Ch 4.

disclosure in Saudi insurance law. After all, it must be remembered that the materiality test in Saudi insurance law places the assured as the point of reference, and not the insurer.¹⁴⁵² Also, such express requirement in the IMCOCR2008 can facilitate catching more easily more general incidents of the assured's bad faith not limited to those related to non-disclosure or misrepresentation, and can confirm the practice of the IVDRC which already requires a general duty of good faith on the assured.¹⁴⁵³ Additionally, a general obligation of good faith can add protection against the assured's misrepresentation as there is no indication of it in the IMCOCR2008. That means if the assured misrepresents some facts, he can be liable under the general duty of honesty and good faith if it is embedded in the IMCOCR2008, besides being possibly liable under the AFR2008 and by the IVDRC, and the general contractual principles.¹⁴⁵⁴

It may be argued that, unlike English general contract law, good faith is a general duty in general contract law in Saudi Arabia, and therefore there is no need to stress it again in insurance law.¹⁴⁵⁵ To a certain extent, this argument can be correct. However, what must be

¹⁴⁵² Art 42 IMCOCR2008; details on the materiality test will be provided below under 5.7.

¹⁴⁵³ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

¹⁴⁵⁴ It must be noted that the AFR2008 considers deliberate misrepresentation as a type of fraud, and therefore liability can be incurred under the AFR2008, even if the remedy is not clearly stated. Also the IVDRC distinguishes between innocent and non-innocent breaches and provides that in case of a non-innocent breach of good faith by the assured, the remedy will be that the assured or the beneficiary's insurance claim will be dropped or forfeited as fraud vitiates the contractual relationship if proved. On the other hand, if the insurer non-innocently breaches good faith, then he pays the claim and any compensation for any harm or expenses which are incurred by the assured; Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013); See above.

¹⁴⁵⁵ See Ch 4.

taken into account is that good faith in insurance contracts bears more significance than other contracts such as sale. For example, in the contract of sale the contract is subject to the options system where the item can be inspected and checked for defects.¹⁴⁵⁶ Meanwhile, in the insurance contract, the risk insured, e.g. fire, illness is not yet present and therefore the trustworthiness of the parties and their honesty regarding the surroundings of the contract e.g. the subject matter, or the insurance history, play a significant role in the risk assessment and in deciding whether to enter into a contractual relationship or not.¹⁴⁵⁷ In other aspects, having a general duty in the IMCOCR2008 will easily facilitate liability on the assured in a more direct manner as explained earlier.¹⁴⁵⁸

It is worth noting that the IVDRC in its practice expects the duty of good faith to be complied with by both the insurer and the assured, despite having the IMCOCR2008 only announcing a general duty of good faith and honesty on the insurer.¹⁴⁵⁹ This indicates that in practice, the duty of good faith is mutual and demanded from both parties regardless of having the duty highlighted statutorily only on the insurer.¹⁴⁶⁰ However, a statutory effect of what is applied in practice will surely clarify the situation, and will help understand and reflect the real legal position.

¹⁴⁵⁶ Ibid.

¹⁴⁵⁷ See *Carter v Boehm* (1766) 3 Burr 1905.

¹⁴⁵⁸ It is worth mentioning that stressing the legal principle again in another context is applied by English law, as even though it is required from the parties to refrain from any misrepresentation, it stresses that again in the insurance context (MIA1906, s 20). This can be because misrepresentation in the insurance context is different from that in general contract law; See Ch 4 for more.

¹⁴⁵⁹ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013) ; Art 11 IMCOCR2008

¹⁴⁶⁰ The IVDRC provides remedies for breaching the duty of good faith by the assured and by the insurer; Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

5.6 STATE OF MIND AND KNOWLEDGE

I English Insurance Law:

MIA1906:

Under the MIA1906 which now applies only to business assureds, the business assured state of mind when committing a misrepresentation does not have an effect on the right of the insurer to avoid the contract.¹⁴⁶¹ The insurer will still be entitled to avoid the contract whether the business assured knew that the representation was false or did not, and therefore fraudulent, negligent and innocent misrepresentations will be on the same footing in that respect.¹⁴⁶² For non-disclosure, the assured is not expected to disclose what he does not know.¹⁴⁶³ The assured is obliged to disclose material information which he actually knows or ought to know in the ordinary course of business and that is settled for marine and non-

¹⁴⁶¹ MIA1906, ss 17, 20; See: *Messrs Dennistoun, Buchanan and Company, Merchants in Glasgow v David Lillie and others, Underwriters in Glasgow* (1821) 3 Bli 202 ; *Hamilton & Co v Eagle Star and British Dominions Insurance Co Ltd* (1924) 19 Ll L Rep 242; *Graham v Western Australian Insurance* (1931) 40 Ll L Rep 64 [66]. The difference in the assured's state of mind may be considered for other purposes e.g. the return of premium to the assured, as he will not be entitled to a return of premium when the insurer avoids the policy if he was fraudulent (MIA1906, s 84(1)).

¹⁴⁶² Ibid.

¹⁴⁶³ *Hearts of Oak Permanent Building Society v Law Union & Rock Insurance Co Ltd* [1936] 2 All ER 619 [625] ; *John Wheelton, Lys Seagar and Charles Lane v Edward Brydges Hardisty, Jacob Bell and Walter Barker* (1857) 8 El & Bl 232 [269] ; *Joel v Law Union Insurance Co* [1908] 2 KB 863 [884] (Fletcher Moulton L J) ; *Whitwell v Autocar Fire and Accident Insurance Co Ltd* (1927) 27 Ll L Rep 418; *Crane v Hannover Ruckversicherungs-Aktiengesellschaft* [2008] EWHC 3165 (Comm), [2010] Lloyd's Rep IR 93; *Sealion Shipping Ltd v Valiant Insurance Company* [2012] EWCA Civ 1625, [2013] 1 Lloyd's Rep108.

marine insurance cases.¹⁴⁶⁴ The right of avoidance given to the insurer depends on the aforementioned duty and that the insurer has been misinformed and not because of mere fraud, and the issues which are stressed here are information which the assured has actual knowledge of, and information where knowledge is imputed on the assured.¹⁴⁶⁵

The MIA1906 states it is assumed that the assured will know every material fact in his ordinary course of business.¹⁴⁶⁶ Case law differentiates in the context of imputed knowledge between information of which the assured reasonably ought to have known considering his knowledge state,¹⁴⁶⁷ and information which does not have grounds for the belief for its existence by a reasonable assured.¹⁴⁶⁸ The crucial question will be: does the actual assured ought to have known such information in the ordinary course of business?¹⁴⁶⁹ Nonetheless, such an approach towards knowledge will not apply if the assured does not act in his ordinary course of business as only the actual knowledge of the assured of the non-disclosed facts will

¹⁴⁶⁴ MIA1906, s 18 (1), *Joel v Law Union and Crown Insurance Co* [1908] 2 K B 863.

¹⁴⁶⁵ R. Merkin, *Colinvaux Law of Insurance* (9th edn, Sweet and Maxwell 2013) para 6-005.

¹⁴⁶⁶ MIA1906, s 18(1).

¹⁴⁶⁷ *ERC Frankona Reinsurance v American National Insurance Co* [2005] EWHC 1381 (Comm), [2006] Lloyd's Rep IR 157; *WISE Underwriting Agency Ltd v Grupo Nacional Provincial* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764.

¹⁴⁶⁸ *Decorum Investments Ltd v Atkin (The Elena G)* [2002] Lloyd's Rep IR 450; *Norwich Union Insurance Ltd v Meisels* [2006] EWHC 2811 (QB), [2007] Lloyd's Rep IR 69 (no duty of disclosure was held on a director of a company who was not aware of information which resulted in the liquidation of the company, and the fact that he signed the documents without reading them was regarded immaterial).

¹⁴⁶⁹ *PCW Syndicates v PCW Reinsurers* [1996] 1 All ER 774; *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 All ER 791; *Simner v New India Assurance Co Ltd* [1995] LRLR 240.

be relevant.¹⁴⁷⁰ Therefore, the assured will be considered to have knowledge if he actually knows the non-disclosed facts, or if he in a deliberate manner closed his eyes in front of the facts which led to the knowledge.¹⁴⁷¹

In respect of the knowledge of materiality, if the assured knew that the information was material, but chose not to disclose it that is considered fraud.¹⁴⁷² Disregarding such fraudulent behaviour, the ignorance of the assured to the materiality of the information which must be disclosed (information actually known or should have been known by him) does not relieve him from liability,¹⁴⁷³ and the reasonableness of the assured or his prudence will have no effect.¹⁴⁷⁴

¹⁴⁷⁰ MIA1906, s 18(1), R. Merkin, *Colinvaux Law of Insurance* (9th edn, Sweet and Maxwell 2013) para 6-005; Cases where actual knowledge only was assumed mostly concern life insurance policies.

¹⁴⁷¹ See *Economides v Commercial Union Assurance Plc* [1997] 3 All ER 636. Where it was submitted that the actual knowledge's sole exception is when the assured choose to ignore the facts that lead to knowledge in a deliberate manner.

¹⁴⁷² *Dalglisch v Jarvie* (1850) 2 Mac & G 231 [243].

¹⁴⁷³ *Joel v Law Union and Crown Insurance Co* [1908] 2 K.B 863.

¹⁴⁷⁴ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581; *James v CGU Insurance Plc* [2002] Lloyd's Rep IR 206; However see *Kausar v Eagle Star Insurance Co Ltd* [2000] Lloyd's Rep IR 154 (Staughton L J) where it was stated that the insurer's right of avoidance should be limited to cases which are *plain* if the assured's conduct was innocent. See also *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2003] EWHC 3038 (Comm), [2004] 1 All ER (Comm) 495 (Simon J) where it was stated that the approach in the latter case was only cautionary towards approving material non-disclosure claims, and that the insurer is not obliged to prove the deliberateness of the assured in non-disclosure of material facts.

The knowledge of the duty to disclose does not bear any significance as the assured can be liable for non-disclosure even if he does not know that he must disclose the facts, and therefore innocent, negligent or fraudulent non-disclosure by the assured will have no effect on his liability for non-disclosure and the right of the insurer to avoid.¹⁴⁷⁵

Regarding the insurer, he is presumed to know matters of common knowledge and also matters that he must know in his ordinary course of business, and therefore there is no need for the assured to disclose such information, along with any other information which the insurer actually knows.¹⁴⁷⁶ .

As for the assured's misrepresentation, section 20 of the MIA1906 provides a distinction between matters of fact and matters of belief or expectation.¹⁴⁷⁷ The assured's material representations regarding matters of fact must be true and are considered true: "*If it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.*"¹⁴⁷⁸

For representations in respect of matters of belief or expectation, they must be only concluded in good faith.¹⁴⁷⁹

¹⁴⁷⁵ *Joel v Law Union and Crown Insurance Co* [1908] 2 KB 863 ; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581; *James v CGU Insurance Plc* [2002] Lloyd's Rep IR 206.

¹⁴⁷⁶ MIA1906, s 18(3) b.

¹⁴⁷⁷ For more details on the matter see above under 5.2.

¹⁴⁷⁸ MIA1906, s 20(3); *Ibid.*

¹⁴⁷⁹ MIA1906, s 20 (4); *Ibid.*

The Fraud Impact:

As for fraud, misrepresentations can be fraudulent if the assured makes a statement which is false with his knowledge that it is false, or his belief that it is false, or with recklessness in the sense that there is a lack of care whether the statement is true or false.¹⁴⁸⁰ It must be noted that the mental element of fraud must be proved and that which may be hard to prove.¹⁴⁸¹

As for fraudulent non-disclosures, they can be imagined if the assured deliberately did not disclose a material fact to the insurer, even if he knew that it was material to him.¹⁴⁸² The fraud impact on the materiality and the inducement required usually for the insurer to avoid the contract is not clear as to whether they can be disregarded if fraud exists.¹⁴⁸³ In the *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd*,¹⁴⁸⁴ it was indicated by Lord

¹⁴⁸⁰ *Derry v Peek* (1889) 14 App Cas 337 [360]-[380] (Herschell L).

¹⁴⁸¹ *Ibid*; it must be noted that in this case it was held that the defendants/directors cannot be sued for fraud as they honestly believed that the statement in the prospectus was true. In other words, the mental element of fraud or dishonesty was absent. However, it could be considered negligent misrepresentation, but there was no doctrine of negligent misrepresentation in tort incurring liability in damages for pure economic loss at the time, as it was introduced after *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; It must be proved that the misrepresenter has intended that false statement will be relied upon by the misrepresentee (*Abu Dhabi Investment Company Ltd v H Clarkson & Co* [2008] EWCA Civ 699 [33]) even though he may not have bad motives behind that (*Polhill v Walter* (1832) 3 B & Ad 114). Knowledge of the false statement, but not realising its significance, does not in itself constitute fraud (*Angus v Clifford* [1891] 2 Ch 449).

¹⁴⁸² *Dalglish v Jarvie* (1850) 2 Mac & G 231 [243]; However the assured's state of mind generally when committing non-disclosure or misrepresentation does not affect the right of the insurer to avoid the contract (see above).

¹⁴⁸³ However, in general contract law fraudulent misrepresentation cannot give the insurer the right to avoid unless inducement to the contract is satisfied (*Horsfall v Thomas* (1862) 1 H & C 90; See Ch 4).

¹⁴⁸⁴ [1994] 3 All ER 581.

Mustill¹⁴⁸⁵ (although in the context of proving inducement) that good faith does not have a disciplinary role and it would be unfair for the insurer to deny liability where he was not harmed, and therefore rejecting the proposition that immaterial fraud can give the insurer the right to avoid.¹⁴⁸⁶ However, a different view was expressed by Mance J in a later case¹⁴⁸⁷ where he found that an attempt by the assured to defraud a third party is itself a material fact to the insurer (moral hazard), and therefore supporting the proposition suggesting that an omission or statement which is fraudulent in the risk presentation can be material to the insurer as a moral hazard, even though it is not material in a direct manner to the risk. More recently, in the context of post-contractual duties it was indicated by Longmore LJ¹⁴⁸⁸ that post-contractual fraud has a neutral impact in the sense that insurers cannot avoid the contract unless materiality and inducement are satisfied as well.

On the other hand, fraud can have some impact on the premium as if the insurer avoided the contract, the premium can be retained by the insurer.¹⁴⁸⁹ Also, the insurer can have an action for the tort of deceit which may entitle him for damages,¹⁴⁹⁰ and a term that limits or

¹⁴⁸⁵ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 [617] (Mustill L).

¹⁴⁸⁶ Such proposition was suggested by earlier authorities (*Sibbald v Hill* (1814) 2 Dow 263; *The Bedouin* [1894] P 1).

¹⁴⁸⁷ *Insurance Corporation of Channel Islands Ltd v Royal Hotel (No 2)* [1998] Lloyd's Rep IR 151.

¹⁴⁸⁸ *K/S Merc-Skandia XXXXII v Certain Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802.

¹⁴⁸⁹ MIA1906, s 84; *Chapman and others, assignee of Kennet v Fraser BR Train* 33 Geo 111.

¹⁴⁹⁰ *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158; *Smith New Court Securities v Scrimgeour Vickers (Asset Management) Ltd* [1996] 3 WLR 1051; Such damages are available in general contract law as well.

excludes the assured's liability because of fraud is not allowed since it violates public policy and an assured cannot benefit from his own fraud.¹⁴⁹¹

CIA2012:

It must be borne in mind that not differentiating between innocent and deliberate misrepresentations can be harsh for those honest and reasonable assureds. The Law Commissions' reforms have stressed that the honest and reasonable assureds must be protected as they can be denied claims even though they tried to get the facts right to the best of their knowledge in statements of fact.¹⁴⁹² Also, conducting insurance now is different from the time when the duty was introduced back in *Carter v Boehm*¹⁴⁹³ where the insurer did not have ways to know easily the information needed to conclude insurance, and had to ask the assured.¹⁴⁹⁴

The author appreciates this view since the need for certainty must not overcome the need for fairness. The subject has been discussed thoroughly by authorities, and Law Commissions.¹⁴⁹⁵ As a result, the CIA2012 abolishes the duty of disclosure and considers the state of mind of the consumer assured for misrepresented facts,¹⁴⁹⁶ therefore differentiating

¹⁴⁹¹ *HIH Casualty and General Insurance v Chase Manhattan Bank* [2003] UKHL 6, [2003] Lloyd's Rep IR 230; however, excluding or limiting fraudulent misrepresentation or non-disclosure by the assured's agent by a clause may still be open.

¹⁴⁹² LCCP2007 para 1.7.

¹⁴⁹³ (1766) 3 Burr 1905.

¹⁴⁹⁴ J. Bird, *Bird's Modern Insurance Law* (9th edn, Sweet and Maxwell 2013) 121.

¹⁴⁹⁵ For example: *Glickman v Lancashire & General Assurance Co* [1927] AC 139; LCCP2007; LCCP2012.

¹⁴⁹⁶ As stated before, the CIA2012 abolished the duty of disclosure.

between deliberate or reckless, and careless, qualifying misrepresentations. Only qualifying misrepresentation, i.e. misrepresentation inducing the contract, and the assured had taken reasonable care not to commit it,¹⁴⁹⁷ which may be deliberate, reckless or careless, can give a remedy for insurers.¹⁴⁹⁸ A deliberate or reckless misrepresentation occurs when the consumer assured

“(a) knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and

*(b) Knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer.”*¹⁴⁹⁹

Careless misrepresentation, however, occurs if the qualifying misrepresentation was neither deliberate nor reckless.¹⁵⁰⁰ Accordingly, misrepresentation committed by consumer assureds where there was reasonable care not to commit it does not give insurers any remedy, as it is not a qualifying misrepresentation according to the CIA2012.¹⁵⁰¹

LCCP2012:

For business insurance, section 18 (1) of the MIA1906 seems to be complex and hard to apply. The LCCP2012 discusses that it is hard to determine exactly whose knowledge in the

¹⁴⁹⁷ CIA2012, ss 4, 2 (2).

¹⁴⁹⁸ CIA2012, s 4.

¹⁴⁹⁹ CIA2012, s 5 (2).

¹⁵⁰⁰ CIA2012, s 5 (3).

¹⁵⁰¹ CIA2012, s 4.

company is accountable, especially in large and international enterprises.¹⁵⁰² Also, there is no clear measure or view about what a business should know, as arguments tend to be between adopting objective or subjective creations.¹⁵⁰³ Moreover, the role of business assured in asking questions before buying insurance is not clearly established.¹⁵⁰⁴ For these difficulties, the LCCP2012 proposed an approach aiming to clarify the whole position. Firstly, the LCCP2012 proposed that a clear meaning for “*known and ought to be known*” is to be embedded for more clarity regarding the persons whose knowledge is relevant and the degree of enquiries needed.¹⁵⁰⁵ For the business entity’s knowledge, the proposal was to include any material information withheld by both the “*directing mind and the will of the organisation*” and those who are authorised by the company to conduct insurance.¹⁵⁰⁶ The knowledge suggested will include actual knowledge and blind eye knowledge where the aforementioned parties in a deliberate manner shut their eyes in front of the information and choose not to know about it.¹⁵⁰⁷ Also, the LCCP2012 suggests that the business assured must disclose any information which can be known by making reasonable enquiries which will correspond to the nature of the insurance in question, its complexity, kind, etc.¹⁵⁰⁸

¹⁵⁰² See LCCP2012 paras 6.1-6.95.

¹⁵⁰³ Ibid.

¹⁵⁰⁴ LCCP2012 paras 6.74.

¹⁵⁰⁵ LCCP2012 paras 6.73.

¹⁵⁰⁶ Ibid 6.74.

¹⁵⁰⁷ Ibid 6.75.

¹⁵⁰⁸ Ibid 6.76.

As for the insurer's knowledge in section 18(3) (b) of the MIA1906 (presumed knowledge), the LCCP2012 suggests setting up clearer principles by codifying the courts' established results. Accordingly, it proposed that matters which do not need disclosure by the business assured unless there is an enquiry include: common knowledge matters,¹⁵⁰⁹ common trade risks which are supposed to be known by a careful insurer,¹⁵¹⁰ matters which are already known to the insurer meaning the "*directing mind and will of the insurer*" and the one making the underwriting decision,¹⁵¹¹ and matters which are withheld by the insurer's agent which is assumed that they have been conveyed to the one making the underwriting decision.¹⁵¹²

For the effect of the business assured's knowledge on misrepresentation, the LCCP2012 suggests to amend the knowledge test in section 20 of the MIA1906 to be similar to section 18 (1) above, therefore suggests that material representations which the assured knows or ought to know about must always be true, whereas other representations are required to be concluded in good faith.¹⁵¹³ The LCCP2012 suggests considering the business assured's state of mind.¹⁵¹⁴ It suggests differentiating between dishonest and non-dishonest conducts where different remedies are suggested.¹⁵¹⁵ The suggestion by the Law Commissions regarding the

¹⁵⁰⁹ Ibid 8.44.

¹⁵¹⁰ Ibid 8.45.

¹⁵¹¹ Ibid 8.46.

¹⁵¹² Ibid 8.47-8.49.

¹⁵¹³ LCCP2012 6.94.

¹⁵¹⁴ See below.

¹⁵¹⁵ Ibid 9.1–9.77; More details on the remedies are provided in Ch7.

definition of dishonest conduct oscillates between two views, namely: referring to dishonest conduct as fraudulent and therefore leaving the courts to determine its definition,¹⁵¹⁶ or referring to deliberate or reckless conduct and adopting a similar definition to the one given by the CIA2012 to qualifying misrepresentations which are deliberate or reckless.¹⁵¹⁷ Therefore, the definition of deliberate or reckless for both non-disclosure and misrepresentation for business assureds can be when they had actual knowledge of the untruth or the misleading of the related information misrepresented or non-disclosed or closed their eyes in front of information leading to such knowledge or were careless about that, or if they had the above knowledge of the relevance of the information to the insurer or were careless about that in respect of omissions.¹⁵¹⁸ The latter view was suggested by insurers since some of them expressed difficulty to prove fraud.¹⁵¹⁹

The draft clauses of the forthcoming Insurance Contract Law Draft Bill, issued recently by the Law Commissions adopt most of the LCCP2012 approach and suggestions.¹⁵²⁰ As mentioned earlier, it will be a statutory duty on the assured to make a fair presentation of the risk by disclosing and representing material information which the non-consumer assured actually knows or ought to know.¹⁵²¹ The draft Bill made a distinction which was not

¹⁵¹⁶ *Derry v Peek* (1889) LR 14 App Cas 337; LCCP2012 para 9.64.

¹⁵¹⁷ See CIA2012, s 5(2).

¹⁵¹⁸ LCCP2012 para 9.67.

¹⁵¹⁹ *Ibid* 9.63–9.68.

¹⁵²⁰ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

¹⁵²¹ Insurance Contract Law Draft Bill, cls 3, 4.

included in the same way in the LCCP2012 between an individual proposer and non-individual proposer.¹⁵²² For the former, knowledge will include what is known to him and what is known to any individual/individuals responsible for his insurance¹⁵²³ (i.e. those who are involved on his behalf in conducting insurance in any capacity, e.g. his employees, agents, etc.).¹⁵²⁴ For the latter, the same knowledge is required,¹⁵²⁵ plus what is known to the senior management¹⁵²⁶ (i.e. individuals who are vital in making decisions in respect the proposer's management or organisation of activities or those who are actually in the management or organisations of these activities).¹⁵²⁷ In any case, the proposer ought to know what can be revealed by a reasonable information search which is accessible to him.¹⁵²⁸ This will include information in his organisation or which others possess, e.g. his agent.¹⁵²⁹

¹⁵²² See below; For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

¹⁵²³ Insurance Contract Law Draft Bill, cl 5(2).

¹⁵²⁴ Ibid, cl 5(5)(b); that may include risk managers, or brokers.

¹⁵²⁵ Ibid, cl 5(3)(b); Ibid.

¹⁵²⁶ Ibid, cl 5(3)(a).

¹⁵²⁷ Ibid, cl 5(5)(a); that may include members of the board of directors.

¹⁵²⁸ Ibid, cl 5 (4); that reflects what is applied in case law where the proposer has a positive obligation to find information about his business, see *London General Insurance Co Ltd v General Marine Underwriters' Association Ltd* [1920] 3 KB 23.

¹⁵²⁹ Ibid.

It must be noted that knowledge of the individual above includes actual and blind eye knowledge.¹⁵³⁰ Blind eye knowledge means that the individual had doubt about it, but did not ask questions about it or confirm it, where he could have such knowledge if he did.¹⁵³¹

For the knowledge of the insurer for the purposes of matters which do not need to be disclosed, where there are no questions from the insurer about them, and which are incorporated in the draft Bill as exceptions to the duty to make fair presentation of the risk,¹⁵³² the draft Bill incorporates some changes in respect of the insurer's knowledge.¹⁵³³ To be specific, the draft Bill defines matters known to the insurer which need not to be disclosed¹⁵³⁴ as known to the individual / individuals who are involved to take the decision on the assured's behalf to accept the risk and determine its terms in any capacity, e.g. agents (those who participate in the underwriting decision).¹⁵³⁵ Also, it clarifies what matters ought to be reasonably known by the insurer, and which do not need to be disclosed,¹⁵³⁶ as they will include matters known to an insurer's agent or employee who should have communicated the relevant facts to an individual/s above (participants in the underwriting decision),¹⁵³⁷ or the relevant matters that are accessible to the individual/s above (participants in the underwriting

¹⁵³⁰ Insurance Contract Law Draft Bill, cl 2(2).

¹⁵³¹ Ibid.

¹⁵³² Ibid, cl 6.

¹⁵³³ See below.

¹⁵³⁴ Insurance Contract Law Draft Bill, s 6(1)(b).

¹⁵³⁵ Ibid, cl 6(2).

¹⁵³⁶ Ibid, cl 6(1)(c).

¹⁵³⁷ Ibid, cl 6(3)(a); That can include for example surveyors' reports.

decision).¹⁵³⁸ For matters presumed to be known by the insurer,¹⁵³⁹ the draft Bill defines them as common knowledge things,¹⁵⁴⁰ things the insurer is expected to know reasonably in his ordinary course of business in respect of the insurance category and the proposer's activity in question.¹⁵⁴¹ The terms 'things' and 'something' refer to "*information and knowledge of any kind, including facts, rumours, expectations and beliefs*".¹⁵⁴²

So, the draft Bill clarifies the meaning of: what is known to the insurer and what ought to be known to the insurer generally which were not clarified enough under the MIA1906. It also clarifies and modifies what is presumed to be known by the insurer, which also does not need to be disclosed. It codifies the current state of law, and it will remain that the knowledge of the individual who is responsible for placing the proposer's risk may be material.¹⁵⁴³

For the non-consumer proposer's state of mind when making a qualifying breach entitling for remedies, the draft Bill states that qualifying breaches can be either deliberate or reckless, or neither deliberate nor reckless, therefore adopting a distinction between the two, and remedies will vary accordingly.¹⁵⁴⁴ The qualifying breach will be deliberate or reckless when the proposer:

¹⁵³⁸ Ibid, cl 6(3)(b); That means that the underwriter needs to look for available information to him within the insurer's organisation.

¹⁵³⁹ Ibid, cl 6(1)(d).

¹⁵⁴⁰ Ibid, cl 6(4)(a).

¹⁵⁴¹ Ibid, cl 6(4)(b); This is a modification of MIA1906, s 18(3)(b).

¹⁵⁴² Ibid, cl 6(5).

¹⁵⁴³ *Butler and Merkin's Reinsurance Law*.

¹⁵⁴⁴ Insurance Contract Law Draft Bill, cl 7(4).

“(a) knew that it was in breach of the duty of fair presentation, or

*(b) did not care whether or not it was in breach of that duty”*¹⁵⁴⁵

The insurer will carry the burden of proving that the breach is deliberate or reckless.¹⁵⁴⁶ Hence, it seems that the draft Bill opted for defining dishonest conduct as deliberate or reckless similar to the CIA2012, rather than defining it as fraudulent and leaving the interpretation to courts.¹⁵⁴⁷ Such discussion was included in the LCCP2012 as regards defining dishonest conduct.¹⁵⁴⁸ However, in the CIA2012, qualifying breaches giving the insurer a remedy can be either deliberate or reckless, or careless,¹⁵⁴⁹ while under the Insurance Contract Law Draft Bill, the qualifying breaches entitling the insurer to a remedy need not to be deliberate or reckless or careless, as even innocent breaches can give the insurer a remedy provided inducement is satisfied.¹⁵⁵⁰ However, the remedies of deliberate or reckless qualifying breaches are different from those which are neither deliberate nor reckless.¹⁵⁵¹

¹⁵⁴⁵ Ibid, cl 7(5).

¹⁵⁴⁶ Ibid, cl 7(6)

¹⁵⁴⁷ CIA2012, s 5(2); LCCP2012 para 9.64- 9.67.

¹⁵⁴⁸ Ibid.

¹⁵⁴⁹ That is because the consumer assured has a duty to take reasonable care not to make a misrepresentation under the CIA2012; See CIA2012, ss 2, 5.

¹⁵⁵⁰ Insurance Contract Law Draft Bill, cl 7(4),(5).

¹⁵⁵¹ The remedies will be discussed in Ch 7.

II Saudi Insurance Law:

Saudi insurance laws and regulations require an element of deliberateness in committing misrepresentation or non-disclosure to consider it as insurance fraud. This is evident from the AFR2008, which provides deliberate concealment and misrepresentation as non-exhaustive examples of insurance fraud.¹⁵⁵² Insurance fraud is defined as “*an act or omission of an act intended to gain dishonest or unlawful advantage for the party committing the fraud or for other parties*”.¹⁵⁵³ Therefore, the distinction can be more general to include any fraudulent or dishonest conduct by the insurer or the assured aiming for an unlawful advantage as misrepresentation and non-disclosure are provided as non-exhaustive examples.¹⁵⁵⁴

Hence, if the misrepresentation or non-disclosure is proven to be innocent or negligent, it will not be considered insurance fraud under the AFR2008. Also Art 45 of the AFR2008 provides deliberately concealing the correct facts or misrepresenting information by the assured as an example of fraud committed by the assured.

Accordingly, it seems that there is a statutory distinction between fraudulent misrepresentation and non-disclosure on the one hand and non-fraudulent misrepresentation or non-disclosure on the other by the AFR2008, or to be more precise between fraudulent and

¹⁵⁵² Art 5 AFR2008.

¹⁵⁵³ Ibid.

¹⁵⁵⁴ Art 5 AFR2008.

non-fraudulent conduct. However, the consequences of such distinction on the contract and remedies are not clear.¹⁵⁵⁵

In practice, the IVDRC considers the assured's state of mind, and differentiates between innocent and non-innocent breaches of good faith as it considers each case based on its circumstances and remedies will vary accordingly.¹⁵⁵⁶ Again, the exact effects of this distinction are not clear. However, the IVDRC provides that in the case of a non-innocent breach of good faith by the assured, the remedy will be that the assured or the beneficiary's insurance claim will be dropped or forfeited as fraud vitiates the contractual relationship if proved.¹⁵⁵⁷ On the other hand, if the insurer non-innocently breaches good faith, then he must

¹⁵⁵⁵ In this sense, Saudi insurance laws are in line with Islamic general contract law, in requiring an element of deliberateness in committing misrepresentation or non-disclosure to consider it fraud. Nonetheless, in Islamic contract law the effects of such misrepresentation and non-disclosure are clear as they entitle the injured party to an option to void the contract or confirm it. In Islamic law, misrepresentation has to be deliberate and fraud and misrepresentation are used interchangeably as having the same meaning. There is no consideration to negligent or innocent breaches within the doctrine of misrepresentation or fraud in Islamic law as it is assumed that they are dealt with by the system of options, as the option of fraud comes as a last resort. However, there are other requirements to have a case of fraud or misrepresentation under Islamic law such as inducement and *ghubn*; See Ch 4 or more.

¹⁵⁵⁶ It is worth mentioning that IVDRC stated at the beginning that violating good faith is considered fraud, which gives the impression that fraud and breach of good faith are the same thing; in other words that there is no consideration of the assured's state of mind – whether he is innocent, deliberate, etc. However, that is not the situation, as it later stated that it uses its discretion to consider the assured's state of mind whether he is innocent or not based on the circumstances of the case; Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

¹⁵⁵⁷ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

pay the insurance claim and any compensation for any harm or expense which is incurred by the assured.¹⁵⁵⁸

As for the knowledge of the insurance parties and the effect of this knowledge on non-disclosure and misrepresentation, the situation remains unclear.

¹⁵⁵⁸ Ibid.

5.7 MATERIALITY TEST

I English Insurance Law:

MIA1906:

According to section 18(1) of the MIA1906 which applies now only to business insurance, the business assured must disclose to the insurer all the material facts known to him or assumed to be known to him, about the insurance contract before entering the contract or the insurer can avoid the contract. Also, according to section 20 (1) of the MIA1906, the assureds' material representations to the insurer and his agent before concluding the contract must be true or the insurer can avoid the contract. The test of materiality for both disclosure and representations is set to be what "*would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk*".¹⁵⁵⁹

Thus, it is clear that materiality is tested to an objective creation i.e. the prudent insurer. However, the debate in case law is the practical application of the test, and the different interpretations to the meaning of "influence".¹⁵⁶⁰ The Court of Appeal in the leading case *Container Transport International Inc v Oceanus Mutual Underwriting Association Bermuda Ltd*¹⁵⁶¹ established that the influence need not to be decisive, and therefore, "mere influence" can render the fact as material. This means that the fact is considered material if a prudent insurer considered it relevant and was interested to know about it to reach its decision, even if such knowledge does not lead to act in a different manner. This low threshold test has been

¹⁵⁵⁹ MIA1906, ss 18(2) , 20(2); This is settled for non-marine insurance cases as well in *Lambert v Cooperative Insurance Society* [1975] 2 Lloyd's Rep 485; See also *Kelsall v Allstate Insurance Co Ltd* The Times, March 20, 1987.

¹⁵⁶⁰ See below.

¹⁵⁶¹ [1984] 1 Lloyd's Rep 476.

criticised as being too harsh, not considering the expectations of a reasonable insured, and encouraging reckless underwriting.¹⁵⁶² However, the interpretation has not changed.¹⁵⁶³ Accordingly, the test can be satisfied by testimonies of experts that the misrepresented or non-disclosed facts would have an effect on a prudent insurer.¹⁵⁶⁴ However, the court can reach its own conclusion on the materiality of a fact, even if no expert evidence is given.¹⁵⁶⁵

¹⁵⁶² P. Griggs ‘Coverage, Warranties, Concealment, Disclosures, Exclusions, Misrepresentations, and Bad Faith’ (1991) 66 Tul L Rev 423, 446.

¹⁵⁶³ The approach was confirmed by the majority of the House of Lords in the *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 (in this case, proof was required that a reasonable insurer considered the fact as increasing the risk, even if he may not have refused to impose cover or fixed a higher premium; therefore its approach is more towards the middle compared to *CTI*); See also *St Paul Fire & Marine Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd’s Rep 116; It was argued that a decisive influence test is more just and fair, see J. Birds & N. Hird ‘Misrepresentation and Non-disclosure in Insurance Law — Identical Twins or Separate Issues?’ (1996) 59 (2) MLR 285, 287.

¹⁵⁶⁴ That can be by field experts, e.g. doctors providing evidence on the assured’s health (*Lindenau v Desborough* (1828) 8 B & C 586), also by other insurers, intermediaries, and the insurer himself as a reasonable insurer (*Mundi v Lincoln Assurance Co* [2005] EWHC 2678 (Ch), [2006] Lloyd’s Rep IR 353). It will be hard for the assured to refute an evidence provided by a consensus of insurers (*North Star Shipping Ltd v Sphere Drake Insurance Plc* [2006] EWCA Civ 378, [2006] Lloyd’s Rep IR 519 (Waller L J), and that was noted in *Carter v Boehm* (1766) 3 Burr 1905 [1918] (Mansfield L), but the situation did not change (*Glasgow Assurance v Symondson & Co* (1911) 104 LT 254 [257]). Accordingly, the assured will rely on the assessment of the judge to the materiality to provide him with protection (*North Star Shipping Ltd v Sphere Drake Insurance Plc* [2006] EWCA Civ 378, [2006] Lloyd’s Rep IR 519 (Waller L J). It must be noted only in some cases courts refused the evidence given by other insurers (for example, *Roselodge v Castle* [1966] 2 Lloyd’s Rep 113).

¹⁵⁶⁵ *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWHC 3122 (Comm), [2010] Lloyd’s Rep IR 695; See also *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593.

Materiality can be presumed as regards questions expressly asked by the insurer;¹⁵⁶⁶ however, immateriality is not assumed as regards information which is not the subject of an express question by the insurer.¹⁵⁶⁷

CIA2012:

The continuous criticism of the MIA1906, led to changes in the law for consumer assureds presented in the CIA2012, while business assureds are still subject to the MIA1906.¹⁵⁶⁸ The CIA2012 abolishes the duty of disclosure, and replaces it with a duty on the assureds to “*take reasonable care not to make a misrepresentation to the insurer*”.¹⁵⁶⁹ The decision of fulfilling reasonable care by the consumer depends on any related circumstances.¹⁵⁷⁰ The CIA2012 numerates some examples of those circumstances which can include the type of the consumer policy, clarity of insurer’s questions, and agency existence.¹⁵⁷¹ The level of reasonable care required is the level of a reasonable consumer;¹⁵⁷² however, circumstances or particularities which are known to the insurer or ought to be known by him about the actual consumer, e.g.

¹⁵⁶⁶ *Glicksman v Lancashire and General Assurance Co Ltd* [1925] 2 KB 593 [608]; [1927] AC 139 [144]. It will be hard for the assured here to say that his answer is immaterial, even if no disclosure would have been needed where no questions are asked (*Herman v Phoenix Assurance Co* (1924) 18 Ll L Rep 371).

¹⁵⁶⁷ *Schoolman v Hall* [1951] 1 Lloyd’s Rep 139, Compare with *Roberts v Plaisted* [1989] 2 Lloyd’s Rep 341 (Purchas L J); for more, see below under 5.10.

¹⁵⁶⁸ See above.

¹⁵⁶⁹ CIA2012, ss 2, 11.

¹⁵⁷⁰ CIA2012, s 3(1).

¹⁵⁷¹ CIA2012, s 3 (2).

¹⁵⁷² CIA2012, s 3 (3).

lack of English language, are taken into consideration.¹⁵⁷³ In any event, misrepresentations which are made dishonestly will always be regarded as not constituting reasonable care.¹⁵⁷⁴

LCCP2012:

The materiality test suggested in the LCCP2007, i.e. the reasonable insured test was refused by the LCCP2012, and no real change from the test in the MIA1906 was suggested.¹⁵⁷⁵ However, the LCCP2012 attempts to explain more about what is meant by material circumstances, and therefore suggests that the business assured is bound to disclose all material matters required to “provide a fair risk presentation” and these include standard information normally disclosed in the market, special information leading to enhanced risk, and any specific issues which resulted in the placing of the insurance coverage.¹⁵⁷⁶

The draft clauses of the forthcoming Insurance Contract Law Draft Bill issued recently by the Law Commissions slightly modify the materiality test embedded in the MIA1906 for information disclosed or represented.¹⁵⁷⁷ To be specific, in the draft Bill a matter is material if it will influence a reasonable insurer in his decision on taking the risk, and on what terms if he decided to take it.¹⁵⁷⁸ Hence, instead of stating “*in fixing the premium*” as in the

¹⁵⁷³ CIA2012, s 3 (4).

¹⁵⁷⁴ CIA2012, s 3 (5).

¹⁵⁷⁵ LCCP2012 paras 4.60–4.71.

¹⁵⁷⁶ Ibid 5.72.

¹⁵⁷⁷ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

¹⁵⁷⁸ Insurance Contract Law Draft Bill, cl 4(5).

MIA1906,¹⁵⁷⁹ the draft Bill adds “*on what terms*” which is more general.¹⁵⁸⁰ For examples of the material circumstances, most of the clarifications made by the LCCP2012 are incorporated with slight modifications.¹⁵⁸¹ Specifically, the draft Bill states that examples of material circumstances can include:¹⁵⁸²

“(a) *special or unusual facts relating to the risk,*¹⁵⁸³

*b) any particular concerns which led the proposer to seek insurance cover for the risk,*¹⁵⁸⁴

*(c) anything which those concerned with the class of insurance and field of activity in question would generally understand as being something that should be dealt with in a fair presentation of risks of the type in question.”*¹⁵⁸⁵

¹⁵⁷⁹ MIA1906, ss 18(2); 20(2).

¹⁵⁸⁰ Insurance Contract Law Draft Bill, cl 4(5).

¹⁵⁸¹ See below.

¹⁵⁸² Ibid, cl 4(6).

¹⁵⁸³ Ibid, cl 4(6)(a).

¹⁵⁸⁴ Ibid, cl 4(6)(b).

¹⁵⁸⁵ Ibid, cl 4(6)(c).

II Saudi Insurance Law:

In contrast to the MIA1906 which adopts a “prudent insurer test” to determine the materiality of the information disclosed by the assured,¹⁵⁸⁶ the CIA2012 which abolishes the duty of disclosure and replaces the former test for consumer assureds with “reasonable care in not committing a misrepresentation”¹⁵⁸⁷. The IMCOCR2008 retains the duty of disclosure and sets the materiality test to be “*what a reasonable person would regard relevant*”.¹⁵⁸⁸ The relevancy meant here is the relevancy to the insurance and to underwrite the risk.¹⁵⁸⁹ This reasonable expectations test is believed to protect the assured from any unanticipated loss of cover for both business and consumer insurance.¹⁵⁹⁰ The test is applied on disclosure by the assured; however, it is not clear if it also applies regarding representation. The point of reference in assessing the materiality of facts which need to be disclosed by the assured is always the assured, revealing yet again an assured-friendly approach compared to the MIA1906 which takes the insurer as its point of reference.¹⁵⁹¹ This approach by Saudi insurance law is similar to a certain extent to the former LCCP proposals for business assureds published in 2007, where the reasonable expectations test of the business assured is suggested to be the test for material information disclosed as a default rule.¹⁵⁹² Nonetheless,

¹⁵⁸⁶ MIA1906, ss 18(2); 19(2).

¹⁵⁸⁷ CIA2012, s 2.

¹⁵⁸⁸ Art 42 IMCOCR2008.

¹⁵⁸⁹ Ibid.

¹⁵⁹⁰ See Art 5; Art 6 IMCOCR2008.

¹⁵⁹¹ MIA1906, ss18(2), 19(2).

¹⁵⁹² LCCP2007 paras 5.1 -5.148.

these former proposals are superseded by the suggestions of the LCCP2012 which rejects the reasonable expectations test due to criticisms of uncertainty.¹⁵⁹³ The Unified Compulsory Motor Insurance Policy (UCMIP) which must be used by insurers for compulsory motor insurance concerned with third party civil liability insurance, has a different approach which can be similar to the MIA1906 regarding what is material. The UCMIP states that a material fact is “*any fact that affects the company's decision to accept or reject insurance or affects the insurance premium or terms and conditions of the contract*”.¹⁵⁹⁴ In practice, the IVDRC employs its discretion in applying the “reasonable person” test in the IMCOCR2008 as an objective standard, based on the circumstances of each case, e.g. the nature and size of the breach and its direct effect on the indemnity entitlement. Such circumstances will affect the remedies accordingly.¹⁵⁹⁵

In the realm of finding the perfect test for Saudi insurance law, the author appreciates the Saudi approach in treating consumer and business assureds similarly, unlike the LCCP2012 proposals, and the CIA2012. However, the author does not find the reasonable expectations doctrine adopted by the IMCOCR2008 for all assureds, and formerly by the LCCP2007 for business assureds convincing. Therefore, the author suggests abolishing the duty of disclosure

¹⁵⁹³ LCCP2012 paras 4.61–4.71.

¹⁵⁹⁴ Art 2 (16) UCMIP. However, it is not clear if reference here is to the prudent company or to the actual company.

¹⁵⁹⁵ The exact effects/ remedies are not clear as they depend on the discretion of the IVDRC. Even though the IVDRC provided that the remedy for non-innocent breach of good faith by the assured will be dropping the insurance claim, while if it was by the insurer the remedy will be paying the claim with damages as compensation for the expenses or harm caused to the assured. The IVDRC, suggested clear provisions explaining the remedies in case of breaching the principle of good faith,; Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013); see Ch 7 for more.

for all types of assureds, both businesses and consumers. The author's view will be explained as follows:

5.7.1 The Reasonable Expectations Test: Does It Work For Saudi Law?

I Certainty And Predictability Dilemmas

The reasonable expectations test may be fairer to the assureds, since it considers their individual characteristics in assessing what to disclose. In this sense, a sophisticated business which is advised by a professional broker will not be treated in the same way as a shopkeeper which buys insurance off the shelf. However, this approach comes on the account of certainty and predictability, which is important, especially to business assureds. The different measures which are applied depending on the capacity of every assured and his position will create a considerable amount of vagueness, since the only way to know how the standard will be applied is through the courts. On the other hand, insurance law in Saudi Arabia is relatively new and there are not enough cases to guide judges in the application of the test or to give the parties the chance to anticipate what result will probably be concluded by the court.¹⁵⁹⁶

It may be argued that an indication of applying the reasonable expectation test can be found in tort law.¹⁵⁹⁷ Accordingly, different measures will be applied depending on the 'category' of the individual assured, not depending on him as an individual. For instance, standards adopted for the category of surgeons¹⁵⁹⁸ will be different from the standards of the category of

¹⁵⁹⁶ See Ch 3.

¹⁵⁹⁷ This argument is raised in the context of warranties by M. Clarke, 'Insurance Warranties: The Absolute End?' [2007] LMCLQ 474, 492.

¹⁵⁹⁸ *White House v Jordan* [1981] 1 WLR 264 (HL).

footballers.¹⁵⁹⁹ Nonetheless, this argument misses the point that in Saudi Arabia, prior cases are not considered as authorities. The judge will have complete discretion to act on the facts of each case, and will not be forced to follow any other case. Moreover, the publicity of cases is an issue not found in Saudi Arabia until recent years.¹⁶⁰⁰ Even this recent publicity is not complete since it is only regards selected cases, and not all the cases are up to date.¹⁶⁰¹ It must be borne in mind that certainty, especially in commercial cases, is important for the stability of the market; therefore more certain measures are advised to be adopted.

Another argument which can be raised in favour of reasonable expectations is that the measure of the ‘reasonable assured’ is an objective standard which can decrease such uncertainty, as the case was with the ‘prudent insurer’ test, since it only adopts those reasonable assureds as a measure.¹⁶⁰² This argument can be easily refuted. When adopting a ‘prudent insurer’ test, the variance between insurers will be relatively low since we will be dealing with professionals in the same field and facing the same circumstances. Conversely, the degree of variance in the ‘reasonable insured’ test is huge. Assureds come from various

¹⁵⁹⁹ *Condon v Basi* [1985] 1 WLR 866 (CA).

¹⁶⁰⁰ See the Council of Ministers decision No 162 dated 26/8/2002 regarding publishing the final court decisions after arranging it and removing names; See also the Minister decision No 364 dated 21/2/2005 regarding establishing a general department for writing and publicising court decisions.

¹⁶⁰¹ The methodology used to publicise court decisions in Saudi Arabia is to select only final decisions, with the most distinct and general application, even if they are not up to date. The main goal is to select the most beneficial cases for the public; See <http://www.moj.gov.sa/mdona_moj/d/esdarat.aspx> accessed 12 January 2010, for the all the publications of the court decisions.

¹⁶⁰² In fact, the objectivity of the standard was mentioned by the IVDRC; Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

professions and backgrounds which makes it hard to adopt 'one measure fits all'. Consequently, the test will end up by creating greatly variable measures to different assureds depending on their characteristics, background, education etc. A reasonable assured standard can be applied for example between a group of fishermen and a group of surgeons. However, the same standard cannot be applied to the surgeons and the fishermen at the same time. Moreover, the type of the policy affects the variance of the test. For example, higher standards are anticipated from doctors contracting for health insurance, whereas the standards will be lower if they contract for motor insurance. In this sense, such objectivity is only illusory and does not increase certainty.

II Not Matching Islamic Contract Law Approach In Objectivity

Another factor justifying the unsuitability of the reasonable expectations test is that the test does not coincide with the objectivity of the Islamic contract law theory, which is the general contract law in Saudi Arabia. As discussed, Islamic contract law tries not to investigate the psychological side of consent.¹⁶⁰³ Instead, it uses preventive objective measures to preserve balance in the contract, such as the system of options.¹⁶⁰⁴ Nevertheless, the reasonable expectations test is a test that actually investigates the state of mind of the hypothetical reasonable assured. It may be argued that the standard is objective since it concerns reasonable assureds and not the actual assureds. However, as discussed above, such objectivity is not genuine because of the huge variance between the assureds in their characteristics, and because of the different types of policies which affect the test. It must be kept in mind that reducing the gap between general contract law and insurance law is always a preferable approach since the law will be easier to comprehend and apply for the assureds.

¹⁶⁰³ See Ch 4.

¹⁶⁰⁴ Ibid.

III Inaccurate Measures For Business Assureds

A fact which must be kept in mind is that business assureds may be large corporations. Determining what a large corporation will reasonably expect can be misleading. The main question will be: which company employee's state of mind will be considered when applying the test? If the yardstick will be the employees authorised to contract with the insurer, this could be inaccurate. What these agents reasonably expect may not be the same as the directors who run the company, as their expectations may be higher or lower. Consequently, this will lower or heighten the threshold as the case, maybe in a way which does not genuinely reflect the state of mind of the business assured, i.e. the company.

IV Increased Time And Costs Needed For Concluding Insurance

Evaluating the insurance risk from the view of a reasonable assured is naturally a disadvantage from an insurer standpoint.¹⁶⁰⁵ The test will not contribute to the valuation of the risk since it will not take the insurer's view as the yardstick.¹⁶⁰⁶ In other words, it will not give the insurer a clear assessment of the risk to enable him to determine the right price of the premium. In fact, it contradicts with imposing the duty of good faith in the first place, which is meant to help the insurer in assessing the risk.¹⁶⁰⁷ Accordingly, the insurer will be more

¹⁶⁰⁵ B. Soyer, 'Reforming Pre-Contractual Information Duties in Business Insurance Contracts – One Reform Too Many?' (2009) 1 JBL 15, 25-27; For more see: N.A. Doherty & H. Schlesinger, 'Rational Insurance Purchasing: Consideration of Contract Non Performance' (1990) 105 (1) Quarterly Journal of Economics 243.

¹⁶⁰⁶ Ibid.

¹⁶⁰⁷ *Carter v Boehm* (1766) 3 Burr 1905 [1909], *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65 (CA) [76].

cautious when conducting insurance and will require more documents and information, in which will increase the time and costs needed for concluding insurance.¹⁶⁰⁸

5.7.2 Abolishment of the Duty of Disclosure: The Real Solution?

The author appreciates the CIA2012 in abolishing the duty of disclosure¹⁶⁰⁹ and suggests that a similar approach is to be applied by the IMCOCR2008 to all assureds. This suggestion is supported on the following grounds:

I Bringing More Certainty To The Contract

When the duty of disclosure is abolished, the insurer will fix the attention on developing useful questions to be asked to the assured for the purposes of the risk assessment. In other words, he will be more specific in the information required in the format of questions and restrict them to include only the most significant questions. Consequently, the assured will know that if he answers the questions accurately, he will be covered, with no hidden traps relating to disclosure. The whole operation will be more certain, whether from the insurer or the assured's perspective.

It might be argued that such abolishment can lead insurers to ask more questions, lengthening the insurance process and increasing costs. As discussed earlier, this result can generate from the reasonable expectations test, when the assured becomes the yardstick in the same degree.¹⁶¹⁰ In both assessments, the information needed by the insurer for the risk assessment

¹⁶⁰⁸ B. Soyer, 'Reforming Pre-Contractual Information Duties in Business Insurance Contracts – One Reform Too Many?' (2009) 1 JBL 15, 25-27; For more see: N.A. Doherty & H. Schlesinger, 'Rational Insurance Purchasing: Consideration of Contract Non Performance' (1990) 105 (1) Quarterly Journal of Economics 243.

¹⁶⁰⁹ CIA2012, s 2.

¹⁶¹⁰ See above under 5.7.2.

process is restricted, namely: by what a reasonable assured reasonably expects in the reasonable expectations test, and by questions asked by the insurer in the proposal form when the duty of disclosure is abolished. Also, the argument misses the effect of the practicality issues on the insurer. The way insurance is conducted today, mostly via the internet or telephone, will only allow insurers to ask the most significant questions which in their view will greatly affect the risk assessment process. It will not be practical for insurers, even if they wanted to, to be more detailed and ask about every single aspect of what they might think it is important or relevant. Hence, they will be forced to concentrate on the most important questions related to the highest risks.

Another pitfall which might be created by the abolishment of disclosure is the risk of insurers asking general questions to the assureds.¹⁶¹¹ This pitfall has been addressed in the LCCP2007 proposals and can be solved by adopting the French approach¹⁶¹² which permits such questions, but it will be for the court to decide whether a reasonable assured will understand that this question was about particular information. This will discourage insurers from asking such general questions in the first place.¹⁶¹³ The reasonable expectations test in this arena will not undermine the objectivity of Islamic general contract law as the court's discretion is for a subsidiary test and not for the substantive test of disclosure.

¹⁶¹¹ LCCP2007 para 4.26.

¹⁶¹² *Code des Assurance*, Art L 112–3 para 2.

¹⁶¹³ LCCP2007 para 4.26.

II Reaching The Reasonable Expectations Of The Assured In A More Accurate Manner

The reasonable expectations of the assured must be protected, but not on the account of certainty or accuracy. Abolishing the duty of disclosure reaches those expectations, but with a more structured method. If the assured answers all the questions in the proposal form honestly, he will reasonably expect that he will be covered. Meanwhile, if he does not, he will reasonably expect the exclusion of the cover. In contrast, the reasonable expectations test is less certain, as even if the assured believes that he disclosed all the facts that he thinks are material, there is always a risk that the court may regard some information as information that should have been disclosed by a reasonable assured and was not. In direct questions, this court discretion will be more limited, leading to more accurate results.

A fact which must not be undermined is that abolishing the duty of disclosure may enable assureds to follow sharp practices through concealing the facts they know are relevant to the insurer. The LCCP2007 revealed how this issue was solved in number of continental countries, e.g. France, by adding provisions for fraudulent concealment or a duty to disclose on the assured if he knew that such information is relevant to the insurer.¹⁶¹⁴ In Saudi insurance law, a similar provision is already incorporated in the AFR2008 which prohibits insurance fraud and alerts insurers from all kinds of fraud by the assured.¹⁶¹⁵ The AFR2008 includes a non-exhaustive list which numerates types of fraud and includes fraudulent

¹⁶¹⁴ See LCCP2007 para 4.26; *Code des Assurances*, Art L 113-8; See also Norwegian Insurance Contracts Act1989, ss 4-1; New York law, see *The Home Insurance Company of Illinois (New Hampshire) v Spectrum Information Technologies, Inc* 930 F Supp 825 (1996 US Dist Ct) (LEXIS 12849), para A.5.

¹⁶¹⁵ Art 5, 45 AFR2008.

concealment and misrepresentations by the assureds.¹⁶¹⁶ Hence, even if the duty of disclosure is abolished, dishonest assureds can still be caught by this regulation. In this way, fraudulent assureds can be penalised without affecting the innocent. However, the author suggests incorporating such provision into the IMCOCR2008 as it is the most useful source of authority as regards the rights and duties of the parties. It must be noted that fraudulent concealment by the assured may be considered a non-innocent breach of the duty of good faith which is required in practice by the IVDRC from the assured, and therefore, such a fraudulent assured can be caught also by the general duty of good faith required from him by the IVDRC.¹⁶¹⁷

III Coinciding With The Objectivity Of Islamic Contract Law

As discussed earlier, Islamic general contract law does not question the psychological side of consent, as in Western laws. Instead, it protects consent by preventive objective measures, e.g. the system of options.¹⁶¹⁸ It is the author's view that Saudi insurance law should have the same approach. Islamic general contract law, as a result of its objectivity, does not have a volume of cases where the psychological side of consent is questioned and which can act as a guide to Saudi insurance law. Hence, Saudi insurance law will be developing its own approach, without any guidance, which can cause difficulties, uncertainties and inaccuracies. By being more objective with insurers asking specific questions, such results can be avoided.

Additionally, the abolishment can bring insurance more in line with Islamic general contract law, since as discussed earlier, disclosure in Islamic contract law is not ultimately required as a general duty, as it is demanded in certain contracts such as trust sales, where trust of the

¹⁶¹⁶ Ibid.

¹⁶¹⁷ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

¹⁶¹⁸ See Ch 4.

parties plays a vital role, and in certain situations, e.g. defects in the subject sold in the sale contract.¹⁶¹⁹ However, good faith is needed from the parties, and therefore disclosure will be required, where non-disclosure violates good faith.¹⁶²⁰

5.7.3 Business And Consumer Assureds: The Same Regime?

The author appreciates the IMCOCR2008's approach in not articulating different regimes for consumer and business assureds, and suggests that the LCCP2012 proposals and the CIA2012 should follow the same approach. Since the IMCOCR2008 already does not recognise such different regimes, the discussion will be mainly based on the Law Commissions' proposals and the CIA2012. The discussion will attempt to refute the arguments of different regimes in support of the unified regimes adopted by Saudi insurance law.

In general, the Law Commissions refused to make different regimes for certain kinds of assureds, to avoid complexities and artificial boundaries; for example, between small and big businesses, and between insurance with and without proposal forms.¹⁶²¹ However, it creates a differentiation between business and consumer assureds which is rather interesting.¹⁶²² They defended the distinct regimes strongly, but the author believes their arguments can be countered. One of the arguments for distinct regimes is that business assureds are assisted by professional advice and qualified brokers who will be acquainted with the existence of the

¹⁶¹⁹ Ibid.

¹⁶²⁰ Ibid.

¹⁶²¹ LCCP2007 para 5.27 (1).

¹⁶²² See for business proposals: LCCP2007 paras 5.1—5.148; LCCP2012, for consumer proposals: LCCP2007 paras 4.1—4.219, LCCIL2009 which ended by adopting the CIA2012.

duty of disclosure.¹⁶²³ The LCCP2007 makes this point but keeps in mind small businesses and thus opts for a reasonable expectations test to protect those businesses.¹⁶²⁴ The author argued earlier that such a test is not suitable to be applied.¹⁶²⁵ Accordingly, to protect small businesses, the duty of disclosure must be abolished as the position for consumers. Moreover, such an argument can lead to unfairness and inaccuracies. It must be remembered that while it is true there can be business assureds who have access to professional advice, there are some businesses that do not. The same situation can be spotted in consumer insurance. Some assureds can afford to be advised by brokers, while others cannot. Assuming that since the assured is a business, it will have a professional advice is inaccurate. There are both sophisticated and unsophisticated assureds in both types; businesses and consumers. In any case, the LCCP2007 was superseded by the LCCP2012 which refuses the reasonable expectations test¹⁶²⁶ and suggests that the business assured must disclose material information necessary to provide a fair presentation of the risk, while keeping the same materiality test in the MIA1906.¹⁶²⁷ This can also incur problems for small businesses in determining the extent of disclosure required to attain a fair presentation of the risk, and the same problems of the materiality test under the MIA1906.¹⁶²⁸

¹⁶²³ LCCP2007 para 5.27 (3).

¹⁶²⁴ LCCP2007 paras 5.83–5.84.

¹⁶²⁵ See above under 5.7.2.

¹⁶²⁶ The LCCP2012 rejects the reasonable expectations test paras 4.60–4.71.

¹⁶²⁷ LCCP2012 paras 5.1–5.12, 6.1–6.79.

¹⁶²⁸ See above.

To solve the situation, a provision for fraudulent concealment can protect the insurer. If a provision provides for avoidance if a broker or an assured actually knows that information is relevant to the insurer and yet conceals it, this can catch those business and consumer assureds who are advised by brokers. A broker will surely know that information is relevant to the insurer and therefore can be captured easily by such provision. The fact that most fraudulent concealment provisions are meant to be articulated for the assureds and not for brokers is not enough to justify a whole different regime on an inaccurate basis.¹⁶²⁹ Instead, it must be a strong reason for including brokers together with the assureds in a fraudulent concealment provision to protect insurers.

The other argument for distinct regimes is that business insurance involves more unusual risks than consumer insurance, which makes it harder for insurers to ask about all the relevant matters.¹⁶³⁰ This argument can be opposed. Unusual risks today can be seen anywhere and it is not a peculiarity of business insurance. The consumer market today is full of unusual risks, where a singer insures his voice, a supermodel insures her face, and footballers insure their legs etc. In fact, compared to these kinds of risks, business insurance risks seem to be more predictable. Each industry has its own set of common risks, e.g. the construction industry, manufacturing, or the marine industry. Therefore, the insurer can perceive most business risks based on the type of industry.

A strong consequence for differentiation between consumer and business assureds which supports a unified regime for both types is that it adds complexity in law and gives way to arbitrary judgments. The author's view is that if the law is unfair, it must be altered as a whole. Deciding what to alter based on the type of the assured is unacceptable. True, consumers may suffer more unfairness by the defective law than businesses. However, this

¹⁶²⁹ See above 5.7.2. , and below.

¹⁶³⁰ LCCP2007 paras 5.27 (2).

does not justify a different regime as it creates convolution and arbitrary judgments leading to different results. The arbitrary judgments can be noticed in deciding which capacity the assured has acted in i.e. whether in his capacity as a business or in his capacity as a consumer which leads to different outcomes; for instance, when an assured wants to insure his car that he uses for his business and for his personal use. If the assured is treated as a consumer, he will need not to volunteer any information according to the CIA2012 and it will be the insurer's responsibility to ask the questions needed, while the assured takes reasonable care not to make a misrepresentation.¹⁶³¹ On the other hand, if he is treated as a business, the duty of disclosure will remain and the assured must disclose all material information influencing a prudent insurer according to the MIA1906.¹⁶³²

It is worth mentioning that a unified regime between all kinds of assureds can bring English law much closer to other jurisdictions in the world in this arena.¹⁶³³ Most continental jurisdictions abolished the duty of disclosure and provided that the assured is required to disclose relevant information only if he was asked by the insurer.¹⁶³⁴ However, the fraudulent behaviour of the assured was avoided as some jurisdictions provided that assureds must disclose facts without the need to be asked by the insurer if they know they are relevant to the insurer,¹⁶³⁵ or articulated provisions for fraudulent concealment.¹⁶³⁶ These jurisdictions do not

¹⁶³¹ CIA2012, s 2.

¹⁶³² MIA1906, s18 (1).

¹⁶³³ See LCCP2007 para 4.18-4.19 in the context of abolishing the duty of disclosure.

¹⁶³⁴ For example, *Code des Assurances*, Art L 113-2-2; Norwegian Insurance Contracts Act 1989, ss 4-1, Swedish Insurance Contracts Act 2005, Chapter 4, s 1.

¹⁶³⁵ For example, Norwegian Insurance Contracts 1989, ss 4-1.

¹⁶³⁶ *Code des Assurances*, Art L 113-8.

draw distinct regimes for business and consumer assureds.¹⁶³⁷ Hence, unifying the regime for business and consumer assureds in English insurance law will bring it much closer to the approach applied in other EU countries. This is particularly important considering that the EU is working on the Principles of European Insurance Contract Laws (PEICL) project,¹⁶³⁸ and fewer differences between EU laws will mean a smoother transition and more chances of success.¹⁶³⁹

It is interesting to note that a proposal to make distinction between different classes of business depending on their size in 2009¹⁶⁴⁰ was refused in the LCCP2012.¹⁶⁴¹ The former proposal was based on smaller businesses needing more protection than big businesses and thus must be treated as consumers for pre-contractual information and unfair terms in the contract.¹⁶⁴² Such proposal adds further evidence that the distinction between consumers and

¹⁶³⁷ Except Swedish Insurance Contracts Act 2005.

¹⁶³⁸ See <<http://restatement.info/cfr/Draft-CFR-Insurance-Contract-17122007-FIN`AL.pdf>> accessed 14 January 2010.

¹⁶³⁹ For more, see Project Group Restatement of European Insurance Contract Law, *Principles for European Insurance Contract Laws: PEICL* (Sellier European Law Publishing 2009).

¹⁶⁴⁰ The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: Micro-Businesses, Should Micro-Businesses Be Treated Like Consumers For The Purposes Of Pre-Contractual Information And Unfair Terms?* (Issues Paper 5, 2009).

¹⁶⁴¹ The reasons included difficulty in defining micro businesses, imposing additional costs on insurers, not much evidence of a real problem, micro businesses are already protected by the FOS; LCCP2012 Appendices A.

¹⁶⁴² The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: Micro-Businesses, Should Micro-Businesses be Treated Like Consumers for The Purposes of Pre-Contractual Information and Unfair Terms?* (Issues Paper 5, 2009) paras 4.1–4.9.

businesses in the first place is not needed as it can create unfairness to smaller classes of business.

5.8 INDUCEMENT

I English Insurance Law:

Although the *Pan Atlantic* case¹⁶⁴³ did not depart from the *CTI* case¹⁶⁴⁴ regarding the test of materiality, it tried to soften the harshness of the test by creating an inducement requirement, which is more of a subjective test.¹⁶⁴⁵ There was a consensus ruling by the House of Lords in the *Pan Atlantic* on the inducement requirement, and it was stated that “*There is to be implied in the 1906 Act a qualification that a material misrepresentation will not entitle the underwriter to avoid the policy unless the misrepresentation induced the making of the contract*”.¹⁶⁴⁶ It was also held that such approach will apply to non-disclosure as well.¹⁶⁴⁷ The justification for introducing such requirement was the need for fairness and to accord

¹⁶⁴³ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581.

¹⁶⁴⁴ *Container Transport International Ltd v Oceanus Mutual Underwriting Association* [1984] 1 Lloyd’s Rep 476. .

¹⁶⁴⁵ The period before the *Pan Atlantic* was unclear regarding inducement, See: *Berger and Light Diffusers Ply Ltd v Pollock* [1973] 2 Lloyd’s Rep 442 (supporting inducement); *Container Transport International Ltd v Oceanus Mutual Underwriting Association* [1984] 1 Lloyd’s Rep 476 (not supporting inducement).

¹⁶⁴⁶ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 (Mustill L) [617].

¹⁶⁴⁷ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581; That approach is taken even though non-disclosure and misrepresentation are different concepts especially when they are innocent: The assured in innocent misrepresentation while filling a proposal form may be ignorant of the truth, while in innocent non-disclosure the assured may know the true facts but does not value them (See J. Birds, *Modern Insurance Law* (9th edn, Sweet and Maxwell 2013) 115, R. Hasson, ‘Misrepresentation and Non-disclosure in Life Insurance—Some Steps Forward’ (1975) 38 MLR 89, 90-91) . It was emphasised by Lloyd L that usually misrepresentation and non-disclosure appear together in claims which may justify such an approach. It is worth noting that the case mainly concerned non-disclosure.

with the general law regarding misrepresentation.¹⁶⁴⁸ Hence, besides satisfying the materiality test which deals with the ‘prudent insurer’, the case held that the ‘actual’ insurer must have been induced by the misrepresented or undisclosed fact to enter the contract or at least enter it on the same terms to be able to avoid the contract.¹⁶⁴⁹ The inducement requirement was not included in the MIA1906 itself¹⁶⁵⁰ and unlike materiality, it concerns the ‘actual’ insurer instead of a ‘prudent’ insurer, and it questions ‘reliance’ and ‘causality’ rather than ‘influence’.¹⁶⁵¹

Even though requiring inducement was clear in the *Pan Atlantic*,¹⁶⁵² the power of the inducement requirement was not totally clear. In the judgment, Lord Mustill has clearly stated that there is a presumption of inducement.¹⁶⁵³ That means that once there is materiality,

¹⁶⁴⁸ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581; see also R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2012) para 6-27.

¹⁶⁴⁹ See also *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 [59],[87], where Clarke LJ following the *Pan Atlantic* stated that the insurer must prove “on the balance of probabilities” that he was induced by a material non-disclosure or misrepresentation to enter the contract.

¹⁶⁵⁰ See MIA1906, s 20(2); s 18(2) regards materiality where there is no mention of inducement; Mustill L was of the view that the MIA1906 did not include such inducement requirement because it concentrated more on the principles which are specifically related to insurance (e.g. materiality test), while the general principles of misrepresentation were not touched upon (*Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581).

¹⁶⁵¹ T. Schoenbaum ‘Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law’ (1998) 29 *Journal of Maritime Law and Commerce* 1, 26.

¹⁶⁵² *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 [619].

¹⁶⁵³ Mustill L has stated that after the presumption of inducement, “*The assured will have an uphill task in persuading the court that the withholding or misstatement of circumstances satisfying the test of materiality has*

there is an inference that the actual insurer has been induced to the contract, even it is an inference of fact and not of law.¹⁶⁵⁴ However, Lord Lloyds did not agree and described the approach as “*heresy long since exploded*”.¹⁶⁵⁵ The better approach in his view is that only when there is an actual inducement, materiality is considered.¹⁶⁵⁶ The view of Lord Mustill was confirmed later in *St Paul Fire and Marine Co (UK) Ltd v McConnell Dowell Constructors Ltd*.¹⁶⁵⁷

However, subsequent case law which developed the inducement principle has required that the insurer must prove that but for the assured’s misrepresentation or non-disclosure, he would have acted in a different manner by refusing to enter the contract in the first place or by entering it on different terms.¹⁶⁵⁸ This can be done, for example, by showing that the non-disclosed facts will probably incur questions by the insurer which will entail having different

made no difference.” (*Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 [619]); See also *James v CGU Insurance Plc* [2002] Lloyd’s Rep IR 206 (Moore-Bick J).

¹⁶⁵⁴ Ibid; See also *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577.

¹⁶⁵⁵ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 [637].

¹⁶⁵⁶ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 [638].

¹⁶⁵⁷ [1995] 2 Lloyd’s Rep 116; The presumption of inducement includes also brokers in third party proceedings (*Gunns and Gunns v Par Insurance Brokers* [1997] 1 Lloyd’s Rep 173).

¹⁶⁵⁸ *Marc Rich & Co AG v Portman* [1996] 1 Lloyd’s Rep 430, [1997] 1 Lloyd’s Rep 225 [422] (Longmore J); *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 [59], [87] (Clarke LJ).

terms if the questions were correctly answered.¹⁶⁵⁹ In *Assicurazioni Generali SpA v Arab Insurance Group (BSC)*¹⁶⁶⁰ Clarke LJ viewed “presumption” of inducement as limited in certain situations where the underwriter cannot provide proof.¹⁶⁶¹ He summarised the rules that need to be considered for inducement.¹⁶⁶² These included that the insurer must prove that he was induced by the material breach by the assured on the balance of probabilities, where but for the assured’s material misrepresentation or non-disclosure, he would have acted in a different manner by refusing to enter the contract in the first place or by entering it on different terms. In other words, there must be some kind of causality in the sense that the misrepresented or undisclosed fact need to be an effective cause to enter the contract to the insurer but not necessarily the only cause.¹⁶⁶³ Additionally, the presumption of inducement is a presumption of fact and not of law, and it can be countered by the assured.¹⁶⁶⁴

¹⁶⁵⁹ *International Management Group v Simmonds* [2003] EWHC 177 (Comm), [2004] Lloyd's Rep IR 247; See also *New Hampshire Insurance Co v Oil Refineries Ltd* [2003] Lloyd's Rep IR 386.

¹⁶⁶⁰ [2002] EWCA Civ 1642, [2003] 1 WLR 577.

¹⁶⁶¹ That was also mentioned in *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430, [1997] 1 Lloyd's Rep 225 [422] (Longmore J); See below for more about this point.

¹⁶⁶² *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 [59], [87] (Clarke LJ).

¹⁶⁶³ *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 [59], [87] (Clarke LJ) ; See also *St Paul Fire and Marine Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116.

¹⁶⁶⁴ *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 [59], [87] (Clarke LJ) ; See also *St Paul Fire and Marine Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116 [127] (Evans LJ); Authorities followed the general law of misrepresentation in that regard (See for example, Lord Mackay of Clashfern, *Halsbury's Law*, vol 31 (4th edn, LexisNexis Butterworths

When considering the presumption of inducement, the court will consider whether the insurer had known the non-disclosed fact or the truth about the misrepresented fact, would he have acted in a different manner.¹⁶⁶⁵ Of course insurers will be motivated to say that they would have not entered the contract or at least agreed on different terms had they known the truth about the misrepresented or the non-disclosed facts; however, the court will assess the proof carefully considering the insurer's experience and qualifications.¹⁶⁶⁶

In any case, it seems that the presumption of inducement is limited to situations where there is a “*good reason*” for the underwriter who accepted the risk, not to provide proof regarding his state of mind when placing the risk.¹⁶⁶⁷ Such limited approach is taken in the light of the

1991) para-1067; *Smith v Chadwick* (1884) 9 AC 187 (HL), see Ch 4 under 4.4 for more about inducement in general law of misrepresentation.

¹⁶⁶⁵ R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-28.

¹⁶⁶⁶ *Ibid*; *Insurance Corporation of the Channel Islands v Royal Hotel (No2)* [1998] Lloyd's Rep IR 151. See also *International Lottery Management Ltd v Dumas* [2002] 1 Lloyd's Rep IR 237; See *North Star Shipping Ltd v Sphere Drake Insurance Plc* [2005] EWHC 665 (Comm), [2005] 2 Lloyd's Rep 76 [70] (Colman J), where he stated that “*such evidence has to be rigorously tested by reference to logical self-consistency, and to such independent evidence as may be available*”. It is possible that the underwriter can overestimate the effect of non-disclosure or misrepresentation since the question of what he would have done had he known the true facts or had the information been fully disclosed is hypothetical; therefore any proof must be considered carefully (*Synergy Health (UK) Ltd v CGU Insurance Plc* [2010] EWHC 2583 (Comm), [2011] Lloyd's Rep IR 500).

¹⁶⁶⁷ *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430, [1997] 1 Lloyd's Rep 225; *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577; *Cape Plc v Iron Trades Employers Insurance Association Ltd* [2004] Lloyd's Rep IR 75; See also: *Laker Vent Engineering Ltd v Templeton Insurance Ltd* [2009] EWCA Civ 62, [2009] Lloyd's Rep IR 704; *Lewis v Norwich Union Healthcare Ltd* [2010] Lloyd's Rep IR 198.

difficult task of refuting the presumption of inducement by the assured.¹⁶⁶⁸ The only cases where reliance on the presumption of inducement was successful were in relation to market subscriptions: if one of the underwriters subscribing to the risk could not provide proof of his state of mind for a good reason,¹⁶⁶⁹ or where the proceedings did not involve the underwriter.¹⁶⁷⁰ When insurers do not provide proof from the underwriter who wrote the risk, there will be no case of inducement. The exception is the case of the unavailability of the underwriter where then the insurer had to provide proof of his own procedures which he normally applies.¹⁶⁷¹ Therefore, it seems that the presumption of inducement will have a greater effect where the underwriter cannot provide proof on his own behalf, as if he can then he must prove inducement.¹⁶⁷²

¹⁶⁶⁸ R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-028.

¹⁶⁶⁹ *St Paul Fire and Marine Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116; *Toomey v Banco Vitalicio de Espana SA de Seguros y Reaseguros* [2003] EWHC 1102 (Comm), [2004] Lloyd's Rep IR 354, [2004] EWCA Civ 622, [2005] Lloyd's Rep IR 423; *Talbot Underwriting v Nausch Hogan & Murray (The Jascon 5)* [2006] EWCA Civ 889, [2006] Lloyd's Rep IR 531; *Scottish Coal Co Ltd v Royal and Sun Alliance Plc* [2008] EWHC 880 (Comm), [2008] Lloyd's Rep IR 718.

¹⁶⁷⁰ *Gunns and Gunns v Par Insurance Brokers* [1997] 1 Lloyd's Rep 173.

¹⁶⁷¹ See *Laker Vent Engineering Ltd v Templeton Insurance Ltd* [2009] EWCA Civ 62, [2009] Lloyd's Rep IR 704; See also *Lewis v Norwich Union Healthcare Ltd* [2010] Lloyd's Rep IR 198, where the court did not support inducement when the insurer sought evidence from one of the underwriters who did not write the risk regarding his usual practices, rather than having it from the one who wrote it. The court regarded the proof irrelevant as it must be shown that the particular underwriter was induced to enter the contract, and hence there is no case of inducement; *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 1705 (Comm), [2011] Lloyd's Rep IR 101 .

¹⁶⁷² It must be noted that the circumstances surrounding non-disclosure are important as well, for example when non-disclosure is innocent, even the fact is material, the court supported that insurers cannot reveal that they would have acted differently had they known the true facts, considering that the assured is honest, and that the

Another matter which must be stressed is as indicated in *Drake Insurance Co Plc v Provident Insurance Co Plc*,¹⁶⁷³ there will be no case of inducement if the same result will be produced by the insurers if the non-disclosure or misrepresentation had not been there, and the burden will be on the insurer to show that he would have acted in a different manner had he known the truth which is a matter of fact.¹⁶⁷⁴ The consideration of inducement can include examining the whole risk not only the non-disclosed or misrepresented facts,¹⁶⁷⁵ and it can get the court involved in answering difficult questions which are of a hypothetical nature, e.g. what would the insurer have done had the fact been disclosed to him? And the courts seem to give commercial reasons a consideration here to refute the insurer's claim that he would not have accepted the risk.¹⁶⁷⁶

risk is accepted by the insurer. (*Synergy Health (UK) Ltd v CGU Insurance Plc* [2010] EWHC 2583 (Comm), [2011] Lloyd's Rep IR 500).

¹⁶⁷³ [2003] EWCA Civ 1834, [2004] Lloyd's Rep IR 277.

¹⁶⁷⁴ For example, it was held that there will be no inducement where the underwriter had accepted a similar risk before on the same terms where full disclosure was provided, even if strong proof of inducement is available (*Norwich Union Insurance Ltd v Meisels* [2006] EWHC 2811 (QB), [2007] Lloyd's Rep IR 69) ; *Synergy Health (UK) Ltd v CGU Insurance Plc* [2010] EWHC 2583 (Comm) , [2011] Lloyd's Rep IR 500); Also the opposite position is true (*Aldridge Estates Investments Co v McCarthy* [1996] EG 167 (CS)); Additionally when the insurer does not know about the non-disclosure or did not place any importance on it, there will be no case of inducement (*Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430) However, if the underwriter did not listen to the assured prudently and comprehend the full implication of what he said, the assured cannot be liable (*Glencore International AG v Alpina Insurance Co Ltd* [2004] EWHC 66 (Comm), [2004] 1 Lloyd's Rep 111), and the proof of previous carelessness in this regard is not admitted (*Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430).

¹⁶⁷⁵ *Drake Insurance Co Plc v Provident Insurance Co Plc* [2003] EWCA Civ 1834, [2004] Lloyd's Rep IR 277.

¹⁶⁷⁶ Ibid; *Bonner v Cox Dedicated Corporate Member Ltd* [2004] EWHC 2963 (Comm), [2005] Lloyd's Rep IR 569, [2005] EWCA Civ 1512, [2006] Lloyd's Rep IR 385.

CIA2012:

The inducement requirement is required as well in consumer insurance cases for misrepresentation to entitle for a remedy as a statutory requirement.¹⁶⁷⁷ The CIA2012 provides that

*“An insurer has a remedy against a consumer for a misrepresentation made by the consumer before a consumer insurance contract was entered into or varied only if ... the insurer shows that without the misrepresentation, that insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms.”*¹⁶⁷⁸ The test for inducement seem to be similar to the common law test: would the result be the same had the insurer known about the true facts misrepresented or undisclosed, and therefore the same principles will apply accordingly.¹⁶⁷⁹

LCCP2012:

As for the business assureds, the inducement is required since common law principles above are applied.¹⁶⁸⁰ In fact, the LCCP2012 emphasises the importance of the inducement

¹⁶⁷⁷ CIA2012 , s 4 (1)

¹⁶⁷⁸ Ibid.

¹⁶⁷⁹ R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-027.

¹⁶⁸⁰ *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All ER 581.

requirement for business assureds, and suggests that similar to the CIA2012, the requirement it is to be embedded in the statute.¹⁶⁸¹

The draft clauses of the forthcoming Insurance Contract Law Draft Bill issued recently¹⁶⁸² make a statutory effect for the inducement requirement formulated by common law similar to the CIA2012.¹⁶⁸³ Therefore, they state that there will be no remedies for the insurer unless the proposer's breach to the duty of making a fair presentation of the risk was a qualifying breach,¹⁶⁸⁴ and that happens if it induces the specific insurer into the contract, i.e. the insurer must show that he would not enter the contract at all 'but for' the breach, or if he would have entered, he would have done so on different terms.¹⁶⁸⁵ Hence, the presentation of inducement in the draft Bill seems to be a prerequisite to the remedy rather than one of the elements of the duty to make a fair presentation of the risk.

II Saudi Insurance Law:

In contrast with English insurance law, Saudi insurance laws do not require the actual insurer to be induced by the misrepresented or undisclosed facts. There is no indication of inducement either in the IMCOCR2008 or the AFR2008.¹⁶⁸⁶

¹⁶⁸¹ LCCP2012 paras 5.82–5.84.

¹⁶⁸² For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm> > accessed in 28 March 2014.

¹⁶⁸³ CIA2012, s 5(b).

¹⁶⁸⁴ Insurance Contract Law Draft Bill, cl 7(2).

¹⁶⁸⁵ Ibid, cl 7(1).

¹⁶⁸⁶ Art 5 of the AFR2008 provides an insurance fraud definition and examples of such fraud which include deliberate non-disclosure and misrepresentation of material information. However it does not require that such deliberate non-disclosure and misrepresentation act as an inducement to enter the contract. In fact, the definition

In this author's opinion, a justification for this difference in approaches lies in that the development of the inducement requirement by English common law was for the sake of mitigating the harsh effects of the materiality test on the assured embedded in the MIA1906.¹⁶⁸⁷ The materiality test in the MIA1906 takes what influences a prudent insurer as the yardstick for deciding that the information is material, although the assured may not know exactly what influences this insurer.¹⁶⁸⁸ Hence, an inducement requirement is justified to alleviate the harshness of the test. Nonetheless, in Saudi insurance law this is not the case. The materiality test in the Saudi insurance law takes the reasonable assured as the yardstick to decide what is material.¹⁶⁸⁹ This test considers the assureds' point of view and therefore there will be no harshness to mitigate by introducing an inducement requirement. Moreover, it will be strange to require that the actual insurer must be induced by the material misstated or non-disclosed fact, while the materiality of same fact is decided by the assured and not by the insurer.

is general which can be applied on both parties of the contract whether it is the insurer or the assured. Also the IMCOCR2008 does not mention any requirement of inducement. It must be noted that Islamic contract law requires inducement by the fraudulent manoeuvres within the doctrine of fraud or misrepresentation (See Ch 4 for more).

¹⁶⁸⁷ See above under 5.7 on the materiality test.

¹⁶⁸⁸ Ibid; MIA1906, ss 18(2), 19(2).

¹⁶⁸⁹ Art 42 IMCOCR2008.

5.9 DURATION OF DUTY/POST-CONTRACTUAL DUTY OF GOOD FAITH

I English Insurance Law:

The duty of utmost good faith which concerns disclosure and representation of material facts for the risk assessment process ends upon the conclusion of the contract and such a rule is evident from section 18 and section 20 of the MIA1906.¹⁶⁹⁰ Before the conclusion of the contract, the assured must disclose all material facts correctly or withdraw any representations made which turn out to be false.¹⁶⁹¹ When the contract is concluded, any subsequent facts not disclosed, change in the circumstances, increase in the risk, or false statements will be not be considered material as they are not considered for the risk assessment process, i.e. accepting the risk or determining the premium.¹⁶⁹²

¹⁶⁹⁰ MIA 1906, s 18 (1) provides that “*Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.*”

MIA 1906, s 20 (1) provides that “*Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract*”

MIA 1906, s 20 (6) provides that “*A representation may be withdrawn or corrected before the contract is concluded.*” See also *Edwards v Footner* (1808) 1 Camp 530 ; *Mander v Commercial Union Assurance Co Plc* [1998] Lloyd’s Rep IR 93.

¹⁶⁹¹ Ibid; for the correction of statements: See *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] Lloyd’s Rep IR131.

¹⁶⁹² *Crane v Hannover Ruckversicherungs-Aktiengesellschaft* [2008] EWHC 3165 (Comm), [2010] Lloyd’s Rep IR 93; such a result is justified on the basis that: materiality of the fact relates only to accepting the risk or

Even though the disclosure and honest representation mentioned earlier in sections 18, and 20 of the MIA 1906 are pre-contractual, it must be noted that the duty of good faith imposed by section 17 of the MIA1906 on the insurance contracts is a general duty and it is not specified or limited to the pre-contractual stage only. The case law indicates that the duty of good faith can continue after the contract is concluded;¹⁶⁹³ however, the nature and scope of this post contractual duty are less clear.¹⁶⁹⁴

determining the premium (MIA 1906, ss 18(2), 20(2)), principles of common law allowing the assured to increase the risk during the policy provided that there are no express conditions that any material change in the nature of the risk which makes the risk a different one from the one provided initially in the contract will give the right of clearing all policy liabilities by the insurer (*Pim v Reid* (1843) 6 Man & G 1; *Mitchell Conveyor & Transport Co Ltd v Pulbrook* (1933) 45 Ll L Rep 239, *Kausar v Eagle Star Insurance Co Ltd* [1997] CLC 129), and finally because of the automatic termination of the policy when there is deviation, change in trip, or delay in respect of marine policies (MIA1906, ss 45-49); See R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-101; See also *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1988] 1 Lloyd's Rep 514; *New Hampshire Insurance Co v MGN Ltd* [1997] LRLR 24 ; *Sirius International Insurance Corp v Oriental Assurance Corp* [1999] Lloyd's Rep IR 343.

¹⁶⁹³ See *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469; *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802. ; *Agapitos v Agnew (The Aegeon)* [2002] EWHC 1558 (Comm), [2003] Lloyd's Rep IR 54, [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573.

¹⁶⁹⁴ See below.

There are several situations ¹⁶⁹⁵ where a post-contractual duty may arise and most of those were mentioned by Longmore LJ in the *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)*, ¹⁶⁹⁶ but generally even the duty of good faith can have a continuing effect, such duty is limited.¹⁶⁹⁷ The first situation mentioned is fraudulent claims, but it is now settled that the duty of good faith and fraudulent claims are to be treated in a separate manner.¹⁶⁹⁸ The second situation is risk variation, as the duty of good faith can attach, but the remedy of avoidance will be limited to the variation, not the original risk created.¹⁶⁹⁹ The third situation is renewal: the duty of good faith will attach to the renewal from the date of the renewal, and therefore avoidance from the date of renewal will be available if the duty is not observed by either of the parties, and even though the breach occurred during the previous contract, but the previous contract will not be avoided as

¹⁶⁹⁵ The situations mentioned will be used to illustrate the current state of law regard rather than what is only relevant to the case.

¹⁶⁹⁶ *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 [22] (Longmore LJ).

¹⁶⁹⁷ See *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 (Hobhouse L) [58]-[60] where it was indicated that the post-contractual duty can attach to held cover clauses, since there is a fresh agreement and that the ship's paper has no relevance, but his Lordship did not go further on the subject, and stated that that the remaining extent of the post-contractual duty is "elusive". The availability of the remedy of avoidance *ab initio* and refusal of damages stresses that such duty is limited.

¹⁶⁹⁸ *Agapitos v Agnew (The Aegeon)* [2002] EWHC 1558 (Comm), [2003] Lloyd's Rep IR 54, [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573.

¹⁶⁹⁹ *Lishman v Northern Maritime Insurance Co* (1874-75) LR 10 CP 179; *Iron Trades Mutual Insurance Co Ltd v Companhia de Seguros Imperio* [1991] 1 Re LR 213; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1997] 1 Lloyd's Rep 360, [2003] 1 AC 469.

well.¹⁷⁰⁰ In consumer policies, where the consumer is only required to take reasonable care not to misrepresent,¹⁷⁰¹ the assessment of reasonable care in his failure to provide answers for the insurer's questions for renewals and variations will consider the communication by the insurer emphasising the significance of providing answers or the results of failing to do so.¹⁷⁰² The fourth situation is held cover clauses where the insured will be covered by the insurer in some situations when the risk changes, provided a notice is given to the insurers and the payment of the additional premium. In such cases, the duty of good faith can attach as there will be a variation in the risk.¹⁷⁰³ Nonetheless, the right of avoidance to the whole policy if

¹⁷⁰⁰ For disclosure by the assured of material information to the renewed contract see: *Lambert v Co-operative Insurance Society* [1975] 2 Lloyd's Rep 485; *James v CGU Insurance Plc* [2002] Lloyd's Rep IR 206; *Moore Large & Co Ltd v Hermes Credit and Guarantee Plc* [2003] EWHC 26 (Comm), [2003] Lloyd's Rep IR 315 ; For failure to correct a false statement at the time of renewal see: *ERC Frankona Reinsurance v American National Insurance Co* [2005] EWHC 1381 (Comm), [2006] Lloyd's Rep IR 157, where such failure was considered non-disclosure, and therefore a breach of the duty will be found only provided the assured knows about such statement. The principle is now embedded in the CIA2012 ; *Synergy Health (UK) Ltd v CGU Insurance plc* [2010] EWHC 2583 (Comm), [2011] Lloyd's Rep IR 500; Ending the policy early and subsequently reinstating it imposes a new disclosure duty for facts before the reinstatement takes place (*Mundi v Lincoln Assurance Ltd* [2005] EWHC 2678 (Ch) , [2006] Lloyd's Rep IR 353).

¹⁷⁰¹ CIA2012, s 2(2).

¹⁷⁰² CIA2012, s 3(2) (d).

¹⁷⁰³ *Lishman v Northern Maritime Insurance Co* (1875) LR 10 CP 179; *Liberian Insurance Agency Inc v Mosse* [1977] 2 Lloyd's Rep 560; *Iron Trades Mutual Insurance Co Ltd v Companhia de Seguros Imperio* [1991] Re LR 213; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469; *Gaughan v Tony McDonagh & Co* [2005] EWHC 739 (Comm), [2006] Lloyd's Rep IR 230 ; It is argued that the duty of good faith will not attach to held cover clauses which offer automatic coverage based on a premium with fixed proportion since there is a prior agreement to the premium as well as an agreement by the insurer to accept an added risk if needed by the assured (See *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 [22] (Longmore LJ) where it

the duty is breached is not favoured, as this right will be limited only to the extension, and this seems to apply to any form of extension of coverage.¹⁷⁰⁴ In respect of consumer policies, the CIA2012 differentiated between two types of variations, namely: variations which can be dealt reasonably in divorce from the subject matter of the contract, and here the duty to take reasonable care not to misrepresent by the assured in section 2(2) of the CIA2012 will attach only to the variation and the impact of its breach will be limited to the variation, while in the second type of variations affecting the whole subject matter of the contract, the former duty will attach to the whole contract, and if breached the impact will be on the contract as a whole.¹⁷⁰⁵ The decision of the variation type will be a matter of fact.¹⁷⁰⁶ The fifth situation is the rights of the policy cancellation by the insurers; however, this does not incur a duty of good faith discussion.¹⁷⁰⁷ The sixth situation is where the insurers request the assureds during

was stated that requiring to have full disclosure by the assured in the course of applying his contractual rights is “*somewhat puzzling*”.

¹⁷⁰⁴ See *Limit No 2 Ltd v Axa Versicherung AG* [2008] EWCA Civ 1231, [2009] Lloyd’s Rep IR 396 (An endorsement extending cover temporarily in a treaty can be avoided in divorce from the original treaty as long as the original treaty has not been subject to inducement by a misrepresentation or non-disclosure); *AC Ward & Sons Ltd v Catlin (Five)* [2009] EWHC 3122 (Comm), [2010] Lloyd’s Rep IR 695 (Avoidance here was only for the endorsement variation: cover for out of hours theft, and not for the whole policy); It must be noted that in case of extension in the form of endorsement to the insurance policy, the right of avoidance for the whole policy may be possible, if the endorsement can be viewed as merged in the policy. Examples of such type of endorsement are endorsements giving effect to different wording to the original policy; however, for the extension of duration endorsement, it can be argued that they have an independent effect from the original policy (*Limit No 2 Ltd v Axa Versicherung AG* [2008] EWCA Civ 1231, [2009] Lloyd’s Rep IR 396).

¹⁷⁰⁵ CIA2012, sch1, prt1, para 10-12.

¹⁷⁰⁶ Ibid.

¹⁷⁰⁷ See *New Hampshire Insurance Co v MGN Ltd* [1997] LRLR 24.

the policy to provide them with certain information by a term in the contract express or implied: in such situation the duty of good faith can attach to such information;¹⁷⁰⁸ however, in case of breach, a right of avoidance may not be available, but there may be a right for damages.¹⁷⁰⁹ Such requests from the insurers are usually found in liability insurance and reinsurance.¹⁷¹⁰ If insurers hold no right for requesting such information, only a duty not to misrepresent material information will be imposed on the assureds rather than a duty of good faith and insurers will have a remedy in common law in case of a breach.¹⁷¹¹ The last situation suggests other incidents where post-contractual good faith can occur impliedly. Examples include liability policies where the insurer has to act in good faith when he defends the assured's claim, even though they have different interests.¹⁷¹² The insurer in such a

¹⁷⁰⁸ See *HLB Kidsons v Lloyd's Underwriters* [2008] EWCA Civ 1206, [2009] Lloyd's Rep IR 178, where it was held that the assured owed a duty of good faith in notification of circumstances which may incur the insurer's liability in a liability policy. The remedy of avoidance was not adhered to as only the notification will be invalid.

¹⁷⁰⁹ *Alfred McAlpine v BAI Insurance* [2000] 1 Lloyd's Rep 437.

¹⁷¹⁰ *Phoenix General Insurance Co v Halvanon Insurance Co Ltd* [1985] 2 Lloyd's Rep 599.

¹⁷¹¹ *Iron Trades Mutual v Cie de Seguros* [1991] 1 ReLR 213 [224].

¹⁷¹² *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437; Compare with *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No2)* [2001] EWCA Civ 1047, [2001] Lloyd's Rep IR 667 (Mance LJ) where the obligation of the insurer to consider the assured's interests when negotiating with third parties was classified as a contractual obligation rather than a post-contractual duty of good faith. Such classification may be to avert the draconian remedy of avoidance *ab initio* (see below). The same approach was applied in *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 54, [2006] 1 Lloyd's Rep 566 (The duty to disclose documents by the assured's brokers to the underwriters after the contract was made was classified as a contractual duty, i.e. an implied term in the contract giving the assured's brokers such duty based on market practice and the assured's utmost good faith, rather than a post-contractual duty of good faith, even though it was admitted the contractual duty was enlightened by the duty of good faith), and in *Horwood & Ors v Land of Leather Ltd* [2010] EWHC 546 (Comm), [2010] Lloyd's Rep IR 453 (It was found that there is an implied term in the contract that an

situation can for example act in a way harming the assured and exhaust the indemnity payment limit by costs where the payment limit includes sums of costs, damages and interest. It was observed by Longmore LJ that only the sixth and seventh situations are proper examples of post -contractual duty of good faith, where the situations from the second to the fourth are more of pre-contractual duties.¹⁷¹³

As in the pre-contractual duty, materiality and inducement requirements are needed in the breach of the post-contractual duty as well.¹⁷¹⁴ However, the test of materiality for the post-contractual duty is less clear than the pre-contractual duty which has its test embedded in section 18 and 20 of the MIA1906.¹⁷¹⁵ The test of the pre-contractual materiality cannot be applicable to the post contractual duty since the two have different contents.¹⁷¹⁶ In the *Litsion Pride*,¹⁷¹⁷ the test of materiality was modified to be applicable to the post- contractual duty where the fact is determined to be material if “*it would influence the judgment of a prudent underwriter in making a decision under the contract for which the information is*

assured must act in good faith as regards the insurer’s interests and subrogation rights in a liability insurance policy).

¹⁷¹³ *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd’s Rep IR 802 [27] (Longmore LJ).

¹⁷¹⁴ *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523 (Rix J) ; *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd’s Rep IR 802.

¹⁷¹⁵ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 [459] (Hobhouse L).

¹⁷¹⁶ *Ibid* [511] (Scott L).

¹⁷¹⁷ *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd’s Rep 437.

required".¹⁷¹⁸ In the *Star Sea*, Lord Scott¹⁷¹⁹ has indicated in the context of undisclosed documents by the assureds in the claims stage which are not decisive for the claim, that the assured at the claim stage has a duty to act honestly, and if he has not acted in bad faith, then there is no breach of the duty of good faith. The assured cannot disclose every document or information that can be relevant to the insurers' payment or refrainment of the claim since this duty which covers a wide ambit has no logical or commercial grounds.

Unlike the pre-contractual duty, the breach of the post-contractual duty requires fraud from the assured. Such a requirement is clear from the cases before the *Star Sea*¹⁷²⁰ and followed as well in the *Star Sea* as indicated at the Appeal stage.¹⁷²¹ The House of Lords indirectly discussed the subject (its concern was limited to fraudulent claims to be treated in divorce of the duty of good faith) and required that the insurer has to prove fraud if he wants to refuse to pay a claim because of non-disclosure and that the assured has to be honest.¹⁷²² In *The Mercandian Continent*,¹⁷²³ the approach regarding the fraudulent claims was confirmed and in the view of Longmore LJ, the post-contractual duty of good faith must be limited to when

¹⁷¹⁸ Ibid (Hirst J) ; the decisions can include: rejecting a claim or having additional premium.

¹⁷¹⁹ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 [511] (Scott L).

¹⁷²⁰ *Orakpo v Barclays Insurance Services Ltd* [1995] LRLR 443; *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523; *Alfred McAlpine Plc v BAI (Run-off) Ltd* [2000] EWCA Civ 40, [2000] Lloyd's Rep IR 352.

¹⁷²¹ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1997] 1 Lloyd's Rep 360.

¹⁷²² *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469; It is noted that all cases which assessed the assured's state of mind, have also fraudulent claims included.

¹⁷²³ *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802.

there are express or implied obligations by the contract to disclose information, and here the disclosure by the assured must be to all material information. In respect of fraud, it must be also material to the claim, and because in the case it was immaterial (was regarded as an ancillary issue), fraud was not considered.¹⁷²⁴ In other words, mere fraud is not sufficient to claim the breach of the post-contractual duty, as materiality and inducement requirements must be also satisfied.¹⁷²⁵ Hence, when the assured fraudulently does not disclose or if he misrepresents material information requested by a contractual obligation in the policy, and inducement to the insurers is satisfied, the assured will be in contractual breach entitling repudiating the policy, and as far as such breach is in existence, there can be a breach of the post-contractual duty of good faith.¹⁷²⁶ That leads us to the remedies issue. Here, Longmore LJ's view is that the remedy for breaching the post-contractual good faith is avoidance *ab initio*, however, since it is harsh and disproportionate it will be available to the insurer only as seen earlier (with the assumption that it is fraudulent) if he has also the right to repudiate the contract because of a serious contractual breach to disclose information, as an added remedy option.¹⁷²⁷ The importance of asserting the breach of the continuing duty of good faith will be

¹⁷²⁴ *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 [30]- [44] (Longmore L J); See *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 (Mustill L) ; Compare with *Insurance Corp of the Channel Islands Ltd v McHugh* [1997] LRLR 94 (Mance J) , where it was held that attempting to defraud is a material fact to insurers.

¹⁷²⁵ Ibid.

¹⁷²⁶ *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 [30]-[44] (Longmore L J).

¹⁷²⁷ Ibid; It was also indicated at [22] that if there is no express contractual obligation for providing information to the insurer, the assured's obligation will be limited not to misrepresent material information, and it will not include any disclosure duties, and here the insurer will have a remedy in case of misrepresentation in principles of common law or under the Misrepresentation Act 1967.

apparent when insurers want to avoid the contract all together including previous claims, as the repudiation by the insurers for the serious, contractual breach will be only from the date of breach.¹⁷²⁸ Prior to this case, the *Star Sea*¹⁷²⁹ seems to view that the remedy is avoidance *ab initio* for post-contractual breach, even though it was criticised as harsh and disproportionate by Lord Hobhouse.¹⁷³⁰ The approach of Longmore LJ in *The Mercandian Continent*¹⁷³¹ was a confirmation of the remedy of avoidance *ab initio* and an attempt to limit its harshness. The availability of avoidance *ab initio* as the only remedy which is harsh and disproportionate made courts, even accepting the existence of the post-contractual duty, more reluctant to label it as precisely similar to the duty embedded in section 17 of the MIA1906.¹⁷³² As for the

¹⁷²⁸ R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-115.

¹⁷²⁹ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* , [2001] UKHL 1, [2003] 1 AC 469.

¹⁷³⁰ *Ibid* (Hobhouse L) [494] , [497].

¹⁷³¹ *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 .

¹⁷³² See *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834, [2004] Lloyd's Rep IR 277 (It was noted that insurers can be in breach of post-contractual good faith to avoid the contract because of non-disclosure of the speeding conviction. However, the court's main justification for denying the insurer's right to avoid was inducement as insurers failed to prove that they were induced by the speeding conviction); *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 54, [2006] 1 Lloyd's Rep 566 (The duty to disclose documents by the assured's brokers to the underwriters after the contract was made was classified as a contractual duty (implied term in the contract giving the assured's brokers such duty based on market practice and the assured's utmost good faith) rather than a post-contractual duty of good faith, even though it was admitted that the contractual duty was enlightened by the duty of good faith); *Horwood & Ors v Land of Leather Ltd* [2010] EWHC 546 (Comm), [2010] Lloyd's Rep IR 453 (It was found that there is an implied term in the contract that an assured must act in good faith regards the insurer's interests and subrogation rights in a liability insurance policy); See also: *Gan Insurance Co v Tai Ping Insurance Co (No2)* [2001] EWCA Civ

nature of the post-contractual duty of good faith, unlike the pre-contractual duty where it is settled that it derives from a rule of law,¹⁷³³ the precise nature of the post-contractual duty is not really clear as even courts seem to treat it as a rule of law emphasising on honesty between the parties and refrainment from acting in bad faith, it was also treated as an implied term in the contract.¹⁷³⁴ In respect of the duration of the post-contractual good faith duty, it was held in the *Star Sea*¹⁷³⁵ that it comes to an end once the legal procedures commence as the procedural law will take over.¹⁷³⁶

1047, [2000] Lloyd's Rep IR 667 (Mance LJ) where the obligation of the insurer to consider the assured's interests when negotiating with third parties was classified a contractual obligation rather than a post-contractual duty of good faith; *Bonner v Cox Dedicated Corporate Member Ltd* [2005] EWCA Civ 1512, [2006] Lloyd's Rep IR 385 (where it was noted by Waller LJ that duty of good faith is only pre-contractual and after the contract every obligation will be contractual by implied or express terms. In other words, the post-contractual duty of good faith is more of something effecting the contractual obligation, not an obligation itself with its own remedies); See O. Gürses 'Post-Contractual Duty Of Good Faith – English Position' a (Insurance Gangnam Style - An insurance masterclass, Perth , 17 May 2013) found in <<http://www.aila.com.au/docs/default-source/speaker-papers/insurance-gangnam-style---dr-ozlem-gurses---post-contractual-ugf-paper.pdf?sfvrsn=4>> accessed 12 Nov 2013.

¹⁷³³ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 (Hobhouse L) ; See also *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581. Such conclusion can be justified as damages cannot be claimed instead of, or in addition to avoidance regarding the pre-contractual breach of the duty of good faith.

¹⁷³⁴ *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 542, 1 Lloyd's Rep 566 ; *Horwood & Ors v Land of Leather Ltd* [2010] EWHC 546 (Comm), [2010] Lloyd's Rep IR 453 ; The implied term was a matter of fact which relies on the contract's nature, parties etc. and not a matter of law.

¹⁷³⁵ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469.

¹⁷³⁶ *Ibid*; *Agapitos v Agnew (The Aegeon)* [2002] EWHC 1558, [2003] Lloyd's Rep IR 54, [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573.

In respect of the insurer's continuing duty of good faith, it was held by the Court of Appeal in the *Good Luck* ¹⁷³⁷ that the insurer has in fact a continuing duty of good faith, but it is owed only to the assureds and not to the bank (assignee of the proceeds of the policy), and on the facts insurers were not in breach of the duty.¹⁷³⁸ In the *Star Sea*,¹⁷³⁹ it was indicated that the fact that the only remedy for breaching the duty of good faith is avoidance *ab initio* which has no benefit to the assured, is itself proof in that the continuing duty has a limited application. Any materiality test mentioned before, obviously cannot be applicable to the insurer's post-contractual duty. There was a suggestion that unjustified claims of premiums by the insurers subsequent to the completion of the contract can be regarded a breach of the insurer's post-contractual duty of good faith.¹⁷⁴⁰ However, on the facts the claim was not considered a breach to the duty and therefore avoidance could not be a remedy for the assureds.¹⁷⁴¹ It can be said that the current case law does not determine the scope of the duty satisfactorily and whether the duty of disclosure on the insurer includes the meaning of the contract and its enforceability.¹⁷⁴² However, the fact that the duty of utmost good faith on the

¹⁷³⁷ *Bank of Nova Scotia v Hellenic War Risks Association (Bermuda) Ltd (The Good Luck)* [1989] 2 Lloyd's Rep 238.

¹⁷³⁸ *Ibid*; The assureds were already aware of the vessel entering the war zone as there was a condition precedent in the policy to notify the insurers about it and they failed to do so. Therefore, there was no need for the insurer to disclose such a fact to the assured.

¹⁷³⁹ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469.

¹⁷⁴⁰ *The Ainikolas* (1996) *Lloyd's List*, 5 April.

¹⁷⁴¹ *Ibid*.

¹⁷⁴² See *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947; *The Ainikolas* (1996) *Lloyd's List*, 5 April ; R. Merkin, , *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-123.

insurer does not contain a general disclosure duty¹⁷⁴³ may strengthen the argument for imposing a disclosure duty on the insurer to explain the implications of the amendments of the policy on coverage upon the renewal of the policy.¹⁷⁴⁴

In respect of handling claims, it is settled that in liability insurance, the insurer owes a duty of good faith in negotiations to the assured as an implied term where its breach may incur damages.¹⁷⁴⁵ Nonetheless, there is divergence regarding whether this rule has general effect, but it is obvious that insurers now do not have complete discretion when it comes to claims' handling.¹⁷⁴⁶

¹⁷⁴³ MIA1906, ss18-19 concern pre-contractual disclosure and misrepresentation of the assured and not the insurer; See for more 5.5.

¹⁷⁴⁴ See the view of Rix J in *Sherdley v Nordea Life and Pension SA* [2012] EWCA Civ 88, [2012] 2 All ER (Comm) 725, where he regarded that changing the policy terms solely by the insurer in the period between the preliminary negotiations and the final agreement a breach of the insurers' duty of good faith; R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-123; See above under 5.5.

¹⁷⁴⁵ *Groom v Crocker* [1939] 1 KB 194 ; *K/S Merc-Skandia XXXXII v Certain Lloyd Underwriters* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 ; See above.

¹⁷⁴⁶ See *Insurance Corporation of the Channel Islands Ltd v McHugh* [1997] LRLR 94 (Mance J), where it was held that the continuing duty of good faith on the insurer does not incur an implied term to negotiate the claims and pay them in good faith and without delay; *Gan Insurance Co Ltd v Tai Ping (No 2)* [2001] EWCA Civ 1047, [2001] Lloyd's Rep IR 667, where it was held that there is no duty on the reinsurer for reasonable actions as regards deciding on accepting a settlement by the reassured. He has a duty only to refrain from irrational actions when deciding, e.g. considering unconnected circumstances; See *Eagle Star Insurance Co Ltd v Cresswell* [2004] EWCA Civ 602, [2004] Lloyd's Rep IR 537 (Rix J) , where it was viewed by Rix J that a restriction, which comes from the post-contractual duty of good faith or an implied term in the contract making the insurer refrain from considering unconnected circumstances to the claim will be applied on the discretion of the reinsurer in his decision on controlling a claim against the reassured which is a condition precedent for the coverage; See also: *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962,

It must be noted that the draft clauses of the forthcoming Insurance Contract Law Draft Bill issued recently, abolish avoidance based on the duty of good faith, as good faith will remain only as an interpretive principle without remedies of its own.¹⁷⁴⁷ As a result, section 17 of the MIA1906 will be modified as the remedy of avoidance will be removed; while it will still state that insurance is a contract of utmost good faith.¹⁷⁴⁸ It must be noted that such position of the duty of good faith will apply to non-consumer insurance in both the pre- and post-contractual stage, while it will apply to consumer insurance for the post- contractual stage only. The reason is that the CIA2012 which governs consumer insurance amends the MIA1906 and the common law position regards the pre-contractual stage only, while the post- contractual stage is left for common law and the MIA1906.¹⁷⁴⁹ As will be seen later, the

[2004] Lloyd's Rep IR 764, where Rix J in his dissenting view, viewed that in case of waiver by the insurer in respect of relevant information, avoidance of the policy will be regarded a breach of the insurer's good faith as waiver is based on fairness, but the majority's view was that reinsurers will have the right to depend on the information "*as it appears of face on things*". However, the dissenting view indicates a beginning of change towards having more of a general effect to the insurer's good faith when dealing with the assured (See below under 5.10 on waiver; Ch 7 under loss of right to avoid for more); See *Diab v Regent Insurance Co Ltd* [2006] UKPC 29, [2006] Lloyd's Rep IR 779, it was found that there is no continuing duty of good faith on the insurers to alert the assured to fulfil the conditions of the claims. However, such duty or an implied term can be possible on the insurers regarding a contract term giving them the right for offering more time for fulfilment; See *Quinn Direct Insurance Ltd v The Law Society of England and Wales* [2009] EWHC 2588 (Ch), [2010] Lloyd's Rep IR 336 [2010] EWCA Civ 647, [2010] Lloyd's Rep IR 655 (Insurers' unreasonable requests for documents needed for a claim were not allowed).

¹⁷⁴⁷ Insurance Contract Law Draft Bill, cl 14.

¹⁷⁴⁸ Ibid, cl 14(3).

¹⁷⁴⁹ R. Merkin, *Colinvaux Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-002A .

Draft Bill stipulates clauses for fraudulent claims and late insurance claim payment.¹⁷⁵⁰ Therefore, the duty of good faith can be beneficial in regulating post-contractual duties in the sense that it can determine when the term is implied in the contract; however, this is the common law position anyway.¹⁷⁵¹ Courts used the duty of good faith to prevent the insurer from using a contractual right in bad faith,¹⁷⁵² and the Law Commissions opted to leave the approach of the courts as it is, regarding using good faith in this way and other similar ways, as a “*shield colouring the contractual obligation*” rather than a “*sword with its own remedies*”.¹⁷⁵³

In respect of prompt payments of the claim without delay or unreasonable refusal by the insurer,¹⁷⁵⁴ even their breach can theoretically be a breach of the insurer’s good faith;¹⁷⁵⁵ however, classifying them as such will be of no benefit to the assured since the only remedy

¹⁷⁵⁰ Ibid, cls 11-13.

¹⁷⁵¹ *Butler and Merkin's Reinsurance Law*.

¹⁷⁵² See LCCP2011 paras, 3.9 - 3.15.

¹⁷⁵³ See LCCP2011 para 4.40.

¹⁷⁵⁴ For more detailed analysis of the subject and the reforms, See Ch 7 , under 7.2.

¹⁷⁵⁵ MIA1906, s17; See *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 [7] (Clyde L) where it was indicated that the duty of good faith is flexible and changeable.

for breach is avoidance *ab initio* and any alternative remedy in damages is refused.¹⁷⁵⁶ In addition, the duty on the insurer was classified as to hold ‘the assured harmless’, and therefore, if the harm occurs the insurer will be in breach of his obligation and have to pay damages, i.e. the claim amount.¹⁷⁵⁷ Accordingly, if the insurer unreasonably delays or wrongly refuses the payment of the claim, the assured is not allowed to claim damages for delay and will only be entitled to the claim amount and interest, as damages are not paid for damages, even if the loss was reasonable and foreseeable.¹⁷⁵⁸ It must be mentioned that this rule was subject to reform by the Law Commissions which published an Issue Paper¹⁷⁵⁹

¹⁷⁵⁶ MIA1906, s 17 ; *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947 [775] (Slade L J) (it must be noted that the case concerned pre-contractual disclosure) ; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483 [68] (Rix L J) ; See Ch 7 for more explanation on remedies.

¹⁷⁵⁷ *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep IR 111; See also : *Apostolos Konstantine Ventouris v Trevor Rex Mountain (The Italia Express (No 3))* [1992] 2 Lloyd's Rep 281 ; *The President of India v Lips Maritime Corporation (The Lips)* [1988] AC 395 (Brandon L) [422]-[425] ; For more detailed analysis on the subject and the reforms, See the remedies in Ch 7.

¹⁷⁵⁸ Ibid; It is worth noting that subsequent decisions to the *Sprung* case which left the door open to find another duty on the insurer to incur damages have failed (*Insurance Corporation of the Channel Islands Ltd v McHugh* [1997] LRLR 94 (finding that there is an implied term to pay the claim in a reasonable time was rejected) ; *Normhurst Ltd v Dornoch Ltd* [2004] EWHC 567 (Comm), [2005] Lloyd's Rep IR 27 ; *Tonkin v UK Insurance Ltd* [2006] EWHC 1120 (TCC), [2006] 2 All ER (Comm) 550) ; However there are exceptions to the *Sprung* rule which include: claims against brokers , reinstatement of property policies (*Arbory Group v West Craven Insurance Services*, [2007] Lloyd's Rep IR 491) and non-indemnity insurance contracts e.g. life policies (*Blackley v National Mutual Life Assn Ltd (No 2)* [1973] NZLR 668) .

¹⁷⁵⁹ The Law Commission and Scottish Law Commission, *Damages for Late Payment and the Insurer's Duty of Good Faith* (Issues Paper 6, 2010) ‘IP6’.

and a Consultation Paper ¹⁷⁶⁰ which suggested making it a statutory duty on the insurer to pay the claim in a reasonable time, which if breached will incur damages.¹⁷⁶¹ The draft clauses of the forthcoming Insurance Contract Law Draft Bill issued recently,¹⁷⁶² have classified the duty of the insurer to pay any amounts due to the insured as regards the claim in a reasonable time under the insurance contract as an implied term in every insurance contract,¹⁷⁶³ and therefore it will be an implied term in law and a contractual obligation, with the relevant remedies applicable if such term is breached.

It must be noted that such implied term will be for the benefit of the assured only and does not extend to third parties as highlighted in the explanatory notes of the draft clauses.¹⁷⁶⁴ However, third parties can benefit if they were assigned to the policy (they became the assureds legally), and they can claim late payment of the insurance claim on behalf of the

¹⁷⁶⁰ The Law Commission and Scottish Law Commission, *Insurance Contract Law : Post Contract Duties And Other Issues, A Joint Consultation Paper* (Law Com CP No 201, Scot Law Com DP No 152, 2011) ‘LCCP 2011’.

¹⁷⁶¹ LCCP2011 para 5.9 ; For more For more detailed analysis on the subject and the reforms , see the remedies on Ch 7.

¹⁷⁶² For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm> > accessed in 28 March 2014.

¹⁷⁶³ Insurance Contract Law Draft Bill, cl 12(1).

¹⁷⁶⁴ Ibid; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf > accessed in 28 March 2014, para 4.7-4.9.

assured.¹⁷⁶⁵ Additionally, such implied term and payment of damages will be regarding valid insurance claims only, and therefore fraudulent claims or claims outside the ambit of the policy are not covered.¹⁷⁶⁶ Damages for breaching the implied term above will be contractual damages, and therefore they will be calculated according to *Hadley v Baxendale*¹⁷⁶⁷ to compensate foreseeable and actual loss, and where there is a mitigation of such loss.¹⁷⁶⁸ The “sums” or “amounts” due to the insured will include those reached by an agreement,¹⁷⁶⁹ or by

¹⁷⁶⁵ Ibid.

¹⁷⁶⁶ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.10.

¹⁷⁶⁷ (1854) 9 Ex 341

¹⁷⁶⁸ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.16.

¹⁷⁶⁹ However, in settlement agreements, it is more likely that the assured will no longer be able to claim a late payment of the claim as such an issue will probably be dealt within the agreement in an express manner. In any case, in practice, insurance claims will be settled by a settlement contract which is pursuant to the insurance contract, and therefore it is not a settlement agreement itself. It must be noted that damages for late payments can still be payable in regard to settlement agreements if there was unreasonable delay in reaching an agreement or in paying the agreed amount. The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.10-4.14.

a court.¹⁷⁷⁰ For the meaning of reasonable time, the draft Bill provides that it is the time which is needed to make an investigation of the claim and for its evaluation.¹⁷⁷¹ Determining the reasonableness of the time will rely on the related circumstances,¹⁷⁷² such as the insurance type,¹⁷⁷³ claim size and degree of complication,¹⁷⁷⁴ complying with the regulatory requirements,¹⁷⁷⁵ and circumstances which cannot be controlled by the insurer.¹⁷⁷⁶ The insurer

¹⁷⁷⁰ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.10-4.14.

¹⁷⁷¹ Insurance Contract Law Draft Bill, cl 13(2).

¹⁷⁷² Ibid, cl 13(3) ; The examples mentioned are non-exhaustive.

¹⁷⁷³ Ibid, cl 13(3)(a).

¹⁷⁷⁴ Ibid, cl 13(3)(b); For example, large claims can consume more time, and the occurrence of the loss abroad can make the claim more complex to investigate, therefore consuming more time; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.20.

¹⁷⁷⁵ Ibid, cl 13(3)(c); For example FCA requirements; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.20.

¹⁷⁷⁶ Ibid, cl 13(3)(d); for example, when there is necessary information which must be provided by the assured or a third party which is not provided, the insurer must not be punished; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.20.

will not be considered in breach of such an implied term for just not paying the claim or part of it, while being in dispute, and there are reasonable justifications for such dispute over validity of the claim or part of it.¹⁷⁷⁷ There must be more than just a reasonable but wrong refusal to be in breach.¹⁷⁷⁸ On the other hand, the insurer's behaviour in dealing with the dispute can be considered in reaching a decision in respect if he was in breach of such an implied term, and the time of breach if there was a breach.¹⁷⁷⁹ The draft Bill states that the remedies for breaching the implied term in the insurance contract to pay the claim in a reasonable time such as damages, will be "*additional and different*" from paying the claim amount,¹⁷⁸⁰ and the interest on that amount from any source, e.g. by the contract, court, etc.¹⁷⁸¹

It is important to emphasise that the FCA rules embedded in the ICOBS contain binding guidelines on claims' handling which apply to insurers and intermediaries carrying out non-investment insurance. These guidelines are embedded specifically in ICOBS 8.1.1, which provides a general obligation on the insurer and the intermediary to:

"1) handle claims promptly and fairly;

¹⁷⁷⁷ Ibid, cl 13(4)(a).

¹⁷⁷⁸ Ibid.

¹⁷⁷⁹ Ibid, cl 13(4)(b) ; For example, if the insurer had reasonable justifications for disputing the claim he can be in breach of the implied term to pay in reasonable time if he was slow in the investigations in an unreasonable manner; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf > accessed in 28 March 2014, para 4.24.

¹⁷⁸⁰ Ibid, cl 13(5)(a).

¹⁷⁸¹ Ibid, cl 13(5)(b).

(2) provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress;

(3) not unreasonably reject a claim (including by terminating or avoiding a policy); and

*(4) settle claims promptly once settlement terms are agreed.”*¹⁷⁸²

For consumer insurance contracts or variations, the rejection of the claim is unreasonable except in the case of fraud, if it was for a misrepresentation which is not a qualifying misrepresentation according to the CIA2012.¹⁷⁸³ Also, if it was for breaching a warranty or a condition which is not connected to the circumstances of the claim, subject to some exceptions.¹⁷⁸⁴

On the issue of whether the insurer owes a duty of good faith when exercising the right to avoid, it can be said that case law confirms the suggestion that the decision for avoiding the contract for the breach of good faith is in fact alleviated by the insurer’s duty of good faith,

¹⁷⁸² For the remedies of breach , see Ch7.

¹⁷⁸³ ICOBS 8.1.2 (1) ; ICOBS 8.1.3 ; CIA2012, s 4.

¹⁷⁸⁴ The exceptions are in ICOBS 8.1.2 (3) which states,

“ (3) for breach of warranty or condition unless the circumstances of the claim are connected to the breach and unless (for a pure protection contract):

(a) under a 'life of another' contract, the warranty relates to a statement of fact concerning the life to be assured and, if the statement had been made by the life to be assured under an 'own life' contract, the insurer could have rejected the claim under this rule; or

(b) the warranty is material to the risk and was drawn to the customer's attention before the conclusion of the contract.”

and the remedy for breach will be to restrict the insurer from his right to avoid.¹⁷⁸⁵ A restriction on the right to avoid by the insurer can be found in the ICOBS rules stated earlier which provide that the insurer must handle the claim fairly and cannot reject the claim in an unreasonable manner including by the way of policy avoidance.¹⁷⁸⁶

¹⁷⁸⁵ The first clear case to this effect was *Strive Shipping Corp v Hellenic Mutual War Risks Association* [2002] EWHC 203 (Comm), [2002] Lloyd's Rep IR 669 (Colman J) (Colman J viewed that insurers' right to avoid would be restricted if it was "unconscionable"); However, that was not applied by the Court of Appeal in *Brotherton v Aseguradora Colseguros SA (No 2)* [2003] EWCA Civ 705, [2003] Lloyd's Rep IR 746 (materiality decided by the insurer cannot be undermined afterwards by the assured by claiming the breach of good faith); Nonetheless a different approach than in *Brotherton* was followed in *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834, [2004] Lloyd's Rep IR 277 (The Court of Appeal decided that there is in fact a duty of good faith owed by the insurer when exercising the right of avoidance which can preclude him from such right. That would be when the insurer has actual knowledge or shut his eyes in front of knowledge of the nonexistence of the facts which are depended on or that they did not induce the contract. On the facts, the majority viewed that the insurer was in breach of the post-contractual duty of good faith when exercising his right to avoid. Rix LJ viewed that insurers must show good grounds for relying on avoidance and not just rely on it without any reasons, Clarke LJ agreed, and both supported that the restriction on the insurers' right of avoidance will be limited to when they actually have knowledge that the facts they relied upon for their right to avoid were immaterial not inducing them to the contract, or did not give them such right of avoidance, but Phill LJ disagreed viewing that what matters is the presentation of the risk not the real situation, and the court cannot reject an avoidance by relying on the post-contractual good faith. Nonetheless, he stated that insurers must make enquiries to see if there are good reasons for their avoidance and if they did not, that would be a breach of their post-contractual duty of good faith. They also must inform the assureds about what they intend to do and offer them a chance for an update, and therefore the knowledge of insurers has no relevance. Hence, the exact position as regards when the insurer would be in breach of the post-contractual duty of good faith when exercising his right of avoidance is not clear. Even an insurer will be in breach when he actually has knowledge of the non-existence of the facts which are relied upon for avoidance, whether or not he must make reasonable enquiries about the facts is not clear.

¹⁷⁸⁶ See above; ICOBS 8.1.1 (3), ICOBS 8.1.2; ICOBS 8.1.3; for the remedies of breach, see Ch7.

Fraudulent Claims:

It must be noted that fraudulent claims by the assureds were considered for a period of time to be a breach of the assured's continuing duty of good faith;¹⁷⁸⁷ however, after the *Star Sea*,¹⁷⁸⁸ the position started to change as it was stressed by Lord Hobhouse that the principle was articulated for the sake of safeguarding the rule that the fraudulent assured cannot benefit from his fraud, which is realised more efficiently through contractual interpretation.¹⁷⁸⁹ This approach was confirmed by the Court of Appeal in subsequent cases: *K/S Merc Skandia XXXXII v Certain Lloyd's Underwriters*¹⁷⁹⁰ and in *Agapitos v Agnew*,¹⁷⁹¹ where it was evident that the duty to refrain from a fraudulent claim and the duty of good faith are separate issues and therefore avoidance *ab initio* cannot be a remedy for the fraudulent claim.¹⁷⁹² A fraudulent claim in insurance contracts requires dishonesty from the assured or at least

¹⁷⁸⁷ *The Litsion Pride* [1985] 1 Lloyd's Rep. 437 ; *Continental Illinois National Bank of Chicago v Alliance Assurance Co Ltd (The Captain Panagos)* [1986] 2 Lloyd's Rep 470 ; See also *Insurance Corporation of the Channel Islands Ltd v McHugh* [1997] LRLR 94.

¹⁷⁸⁸ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469.

¹⁷⁸⁹ Ibid [61] (Hobhouse L) where he stated that "*The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.*"

¹⁷⁹⁰ *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 .

¹⁷⁹¹ *Agapitos v Agnew (The Aegeon) (No 1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 57.

¹⁷⁹² The remedies for fraudulent claims will be dealt with in detail in Ch 7.

recklessness, and therefore negligence alone is not enough.¹⁷⁹³ Recently in *Aviva Insurance Ltd v Brown*,¹⁷⁹⁴ the test for dishonesty was set to include a subjective test as well as an objective test:

*“Before there can be a finding of dishonesty it must be established that the defendant’s conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest.”*¹⁷⁹⁵

On the facts, it was held that there is no fraudulent claim by the assured as even if there was objective dishonesty (non-disclosure of the assured’s interests in the company), the subjective element of dishonesty was missing as the assured did not realise that his behaviour is dishonest (the assured thought that insurers knew about his interests in the company).¹⁷⁹⁶ Also, the case indicates that dishonesty in the claim cannot be excused because of the insurer’s delay.

¹⁷⁹³ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469; *Tonkin v UK Insurance Ltd* [2006] EWHC 1120 (TCC), [2007] Lloyd’s Rep IR 283; *US Trading Ltd v Axa Insurance Co Ltd* [2010] Lloyd’s Rep IR 505; See also Fraud Act 2006, ss1-4.

¹⁷⁹⁴ [2011] EWHC 362 (QB), [2012] Lloyd’s Rep IR 211 [101], The case is regarded the first case which discusses the subjective element of fraud in fraudulent insurance claims.

¹⁷⁹⁵ *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [27] (Hutton L), The test in the former case was viewed as the suitable test for dishonesty by Eder J in *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB), [2012] Lloyd’s Rep IR 211.

¹⁷⁹⁶ *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB), [2012] Lloyd’s Rep IR 211; It was observed that the subjective test will have limited application as in the case the assured has benefited from the property ownership law and the availability of the correct information to the insurers.

Fraudulent claims can appear in different forms¹⁷⁹⁷ which can include claims where there is: no loss occurred,¹⁷⁹⁸ genuine loss but exaggerated,¹⁷⁹⁹ a failure to correct a claim when the assured becomes aware of an exaggeration in the claim or of an absence of loss,¹⁸⁰⁰ genuine loss with suppression of defence which the assured is aware of and open to insurers,¹⁸⁰¹ genuine loss with enhancement by fraudulent devices or means.¹⁸⁰²

¹⁷⁹⁷ These are mentioned by Mance L J in the *Agapitos v Agnew (The Aegeon) (No 1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573.

¹⁷⁹⁸ That includes when no loss at all has taken place (a recent example can be found in *Parker v National Farmers Union Mutual Insurance Society Ltd* [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep IR 253) or when there is a self-inflicted loss.

¹⁷⁹⁹ *Galloway v Guardian Royal Exchange (UK) Ltd* [1999] LRLR 209 ; *Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd* [2010] EWHC 2192 (QB), [2011] Lloyd's Rep IR 238; *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB) , [2012] Lloyd's Rep IR 211. Nonetheless, some problems can arise when the exaggerated claim is not made with the intention to defraud the insurer, but to enhance the position of the assured in negotiations with the insurer bearing in mind that the amount claimed may not be fully recovered since the insurers can counter claim the loss value and parts of the claim (*Orakpo v Barclays Insurance Services Co Ltd* [1995] LRLR 443); In *Galloway*, the court rejected the approach based on the size of the claim regards the decision on the parts which can be rejected from the claim, since it can lead to a strange results where the bigger the true loss is, the bigger the fraudulent claim will be. Instead the focus must be on the assured's misconduct.

¹⁸⁰⁰ Also, it can include the failure by the assured to correct information which became incorrect after submission. The reasons can include change in the circumstances or the partial recovery of the subject matter insured. See: *Piermay Shipping Co SA v Chester (The Michael)* [1979] 2 Lloyd's Rep 1.

¹⁸⁰¹ Here the assured knows about a defence which can be used by insurers; however, he does not tell the insurers about the defence. Divergence can be observed as regards such type : Some view that in order to have a case of fraudulent claim here, there must be a deliberate act of suppression (H. Bennett, *The Law of Marine Insurance* (2nd edn, OUP 2006) para 22-83) , while others treat it separately and give the insurer the option of a

It is worth noting that all these types will have the same remedy: the whole claim is to be forfeited, including the genuine parts of the claim;¹⁸⁰³ however, the burden of proof is lighter and easier when the claim is enhanced by fraudulent means and devices.¹⁸⁰⁴ The area is under reform by the Law Commissions which issued an Issue Paper¹⁸⁰⁵ and a Consultation Paper¹⁸⁰⁶

remedy under a fraudulent claim or a remedy which can apply to the defence which is suppressed (R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 9-028); See : *Total Graphics Ltd v AGF Insurance Ltd* [1997] 1 Lloyd's Rep 599 ; *Agapitos v Agnew(The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573; J. Hjalmarsson, 'The Law on Fraudulent Insurance Claims' (2013) JBL 103,108-109.

¹⁸⁰² See *Agapitos v Agnew (The Aegeon) (No1)* [2002] EWCA Civ 247; [2002] Lloyd's Rep 573 ; See also *Eagle Star Insurance Co Ltd v Games Video Co (GVC) SA (The Game Boy)* [2004] EWHC 15 (Comm), [2004] 1 Lloyds 238, *Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd* [2010] EWHC 2192 (QB) , [2011] Lloyd's Rep IR 238, *Aviva Insurance Ltd v Brown* [2011] EWHC 362 (QB), [2012] Lloyd's Rep IR 21.

¹⁸⁰³ The justification is mentioned in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 [61] (Hobhouse L) where it was stated that "*The fraudulent insured must not be allowed to think: if the fraud is successful, then I will gain; if it is unsuccessful, I will lose nothing.*" ; *Agapitos v Agnew(The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573. The remedies for fraudulent claims and the reforms will be dealt with in detail in Ch 7.

¹⁸⁰⁴ *Agapitos v Agnew (The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573 (summary judgment for these kind of cases was supported) ; *Interpart Comercio E Gestao SA v Lexington Insurance Co* [2004] Lloyd's Rep IR 690 (Summary Judgment was not supported) but now the inclination is to give summary judgments, but see *PT Buana Samudra Pratama v Maritime Mutual Insurance Association (NZ) Ltd (The Buana Dua)* [2011] EWHC 2413 (Comm), [2011] 2 Lloyd's Rep 655 ; See for more J. Hjalmarsson, 'The law on fraudulent insurance claims' (2013) JBL 103, 108-111.

¹⁸⁰⁵ The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: The Insured's Post-Contract Duty of Good Faith* (Issue Paper 7, 2010) 'IP7'.

and recently published draft clauses of the forthcoming Insurance Contract Law Draft Bill.¹⁸⁰⁷ The draft clauses codify the remedies of fraudulent claims in common law, and such remedies will be discussed in detail later in chapter 7. Nonetheless, as far as defining fraudulent claims is concerned, the draft clauses do not determine when the claim is to be considered fraudulent, or the remedies of the fraudulent means and devices which are left for courts and common law principles.¹⁸⁰⁸ The same is applied as regards determining when several claims are to be treated as one whole claim, and courts' approaches seem to widen the definition of a 'whole claim'.¹⁸⁰⁹

¹⁸⁰⁶ The Law Commission and Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and Other Issues, A Joint Consultation Paper* (Law Com CP No 201, Scot Law Com DP No 152, 2011) 'LCCP2011'; The key suggestion regard fraudulent claims was codifying the common law position and incurring the forfeiture of the fraudulent claim in case of breach; LCCP2011 8.17; For more detailed explanation of the remedies, See Ch 7.

¹⁸⁰⁷ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

¹⁸⁰⁸ *Butler and Merkin's Reinsurance Law*; For definition of fraudulent claims, see *Derry v Peek* (1889) LR 14 App Cas 337; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 3.9.

¹⁸⁰⁹ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, paras 3.10-3.11.

Additionally, the draft clauses do not incorporate the suggestion of having a statutory duty on the assured to pay fraud investigation costs.¹⁸¹⁰ The impact of the draft Bill though is that it makes it clear that fraudulent claims are not to be treated as a breach of the duty of good faith, and valid claims before fraud must be paid.¹⁸¹¹

The test of materiality for claims supported by fraudulent devices is established in *The Aegeon* where it was stated¹⁸¹² that:

“A fraudulent device is used if the insured believes he has suffered the loss claimed, but seeks to improve or embellish the facts surrounding the claim by some lie.....any lie, directly related to the claim,....which is intended to improve the insured’s prospects of obtaining a settlement or winning the case, and which would, if believed, tend, objectively to yield a not insignificant improvement in the insured’s prospects”

The former test may be subject to change after *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*¹⁸¹³ where it was criticised for having an inflexible low threshold for materiality. Even Mr Justice Popplewell denied the assureds’ claims and found for the insurers by applying the materiality test in the *Aegeon* and by finding that the false statements

¹⁸¹⁰ *Butler and Merkin's Reinsurance Law*; The justifications for that are that they are too complicated, they can lead to increasing investigation costs and premiums, and they do not really deter fraud; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 3.29.

¹⁸¹¹ *Butler and Merkin's Reinsurance Law*.

¹⁸¹² *Agapitos v Agnew (The Aegeon) (No 1)* [2002] EWCA Civ 247, [2002] Lloyd’s Rep IR 573 [49]–[50] (Mance LJ).

¹⁸¹³ [2013] EWHC 1666 (Comm), [2013] Lloyd’s Rep IR 582.

of the general manager of the vessel were material. He criticised the former materiality test heavily based on a number of grounds;¹⁸¹⁴ fraudulent devices which are used to enhance a genuine claim for an attempt to have a higher settlement or a quick payment of the claim reflect low culpability by the assured, compared to fraudulent claims which are used to give the assured more than what he is entitled to by the contract, and therefore there must be a distinction between the two. Also, the results of applying the former test are harsh and disproportionate, e.g. no possibility of retraction or correction of the false statement, no need for the insurer to be misled by the fraudulent device. On the facts the false statement used to support the genuine claim was made recklessly and was not an organised lie which was told once, and the manager believed at the time that it was reasonable, and it was not upheld during the litigation. The alternative test in his view must consider the fairness and proportionality of forfeiting the whole claim with the facts as he suggested that “*the policy of the law should be to require at least a sufficiently close connection between the fraudulent device and the valid claim to make it just and proportionate that the valid claim should be forfeit*”.¹⁸¹⁵

For alternative pleas, the position now is that insurers may claim alternative pleas when claiming fraud,¹⁸¹⁶ and the old *Jureidini* rule which states that any plea of fraud by insurers will deprive them from claiming any defence by the policy since it will be considered repudiated no longer applies.¹⁸¹⁷

¹⁸¹⁴ See *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 1666 (Comm), [2013] Lloyd's Rep IR 582 [144]-[225] (Poplewell J).

¹⁸¹⁵ Ibid [177] (Poplewell J).

¹⁸¹⁶ *Super Chem Products Ltd v American Life and General Insurance Co Ltd (Trinidad and Tobago)* [2004] UKPC 2, [2004] Lloyd's Rep IR 446.

¹⁸¹⁷ Ibid; *Jureidini v National British and Irish Millers Insurance Co Ltd* [1915] AC 499.

II Saudi Insurance Law:

The duration of the duty of good faith in Saudi insurance laws required by the insurer or the assured is not evident at first glance. Instead, it is implied in several sections in the IMCOCR2008, the AFR2008, and the LSCIC2003 implementing regulations. At first, it must be noted that the general requirement of honesty or good faith required from the insurer and the intermediary in the IMCOCR2008 is a general requirement which is not limited to the pre-contractual stage only.¹⁸¹⁸ Therefore, it can be stated that good faith must be observed throughout the contractual relationship including the pre- and post-contractual stage.

For the insurer's post-contractual duty of good faith, the IMCOCR2008 provides in article 51, which concerns post-contractual services, that insurers are required to inform the assureds in a prompt manner about any changes in the disclosure or conditions made at the time of entering the contract, e.g. changes in procedures for filing claims. In respect of claim handling, the IMCOCR2008 provides numerous duties on the insurers regarding the assureds¹⁸¹⁹ which are similar to the ones provided by the ICOBS 8.1.1 and which include: promptly responding to claims,¹⁸²⁰ informing the assured about the receipt of the claim and any further needed information which is not provided,¹⁸²¹ guiding the assured in the claim filing and regarding the procedures of handling the claim,¹⁸²² which must be handled in a fair manner by the insurer.¹⁸²³ Additionally, the investigation by the insurer must be within a

¹⁸¹⁸ Art 11 IMCOCR2008; See above under 5.2 & 5.5.

¹⁸¹⁹ Those are numerated in Art 52 IMCOCR2008.

¹⁸²⁰ Art 52(a) IMCOCR2008; See also ICOBS 8.1.1 (1).

¹⁸²¹ Art 52 (c) IMCOCR2008.

¹⁸²² Art 52(d) IMCOCR2008; See also ICOBS 8.1.1(2).

¹⁸²³ Art 52(f) IMCOCR2008; See also ICOBS 8.1.1 (1).

reasonable time¹⁸²⁴ and the assured must be notified about the progress of the claim¹⁸²⁵ and also about its results including an explanation of the decision whether it is accepted or refused.¹⁸²⁶ The IMCOCR2008 provides that the accepted claim must be settled without unjustified delay,¹⁸²⁷ but does not provide a clear remedy for such delay, as it only states that if there was a delay an explanation of the reasons must be provided.¹⁸²⁸

For the assured's post-contractual duty of good faith, as explained earlier there is no express general duty of good faith on him as on the insurer announced in the law itself, and such position was justified earlier.¹⁸²⁹ Also, it was explained that does not mean that assureds can act in bad faith and that in practice the IVDRC expects the assured as well as the insurer to comply with the duty of good faith and consider that it is mutual.¹⁸³⁰ The IMCOCR2008 provides that the assured's disclosure duty which the insurer must inform him about is required *at every stage* of the contractual relationship including the application, claims and renewal stages.¹⁸³¹ When looking at the AFR2008, article 45 provides a non-exhaustive list of fraud committed by the assured, which includes fraudulent concealment and

¹⁸²⁴ Art 52(h) IMCOCR2008.

¹⁸²⁵ Art 52 (e) IMCOCR2008; See also ICOBS 8.1.1(2).

¹⁸²⁶ Art 52(i) IMCOCR2008.

¹⁸²⁷ Art 53 IMCOCR2008; The period for claim settlement will be according to the implementing regulations of the LSCIC2003 which states in Art 44 that an insurer is required to settle the claims of the assured within 15 days if he is an individual, and within 45 days if he is a commercial entity ; See also ICOBS 8.1.1(4).

¹⁸²⁸ Ibid.

¹⁸²⁹ See above under 5.5.

¹⁸³⁰ Ibid.

¹⁸³¹ Art 32 IMCOCR2008.

misrepresentation before and after entering the insurance contract including the claim filing stage. It must be noted that in the UCMIP, any material changes in the representations and disclosure provided by the assured in the proposal form must be notified to the insurer within 10 working days. The insurer will inform the assured of his decision to provide cover with these changes within 3 working days.¹⁸³² Also, compared to the IMCOCR2008, the UCMIP clearly confirms the right of the beneficiary to be compensated if there is a delay in settling the claim by the insurer exceeding 15 days with no acceptable excuse.¹⁸³³

Based on the above mentioned, it seems that in Saudi insurance laws the duty of good faith is needed from both parties throughout the whole contractual relationship including the pre- and post-contractual stage. This result coincides with the Islamic law principles which adhere to acting in good faith at all times.¹⁸³⁴ In contrast, the English insurance law duty of good faith is originally pre-contractual. Even though the duty was extended after the conclusion of the contract, such extension is subject to limitations and comes to an end at the beginning of the legal proceedings.¹⁸³⁵ It must be noted that the general remedy for breaching the post-

¹⁸³² Art 8 (2) UCMIP.

¹⁸³³ Art 8 (6) UCMIP.

¹⁸³⁴ See Ch 4; Under Islamic law principles, the parties must disclose material facts before entering the contract. However, if they fail to do so for legitimate reasons, they still have the chance to disclose those material facts within three days after the conclusion of the contract. See M. Billah, *Applied Takaful and Modern Insurance: Law and Practice* (3rd edn, Sweet and Maxwell 2007) 216.

¹⁸³⁵ See above.

contractual duty of good faith in Saudi laws is not clearly specified, which is similar to the position of the remedies when breaching the pre-contractual duties.¹⁸³⁶

In respect of fraudulent claims, it is not really clear in Saudi insurance law whether they are regarded as a breach of the continuing duty of good faith or not. The AFR2008 when numerating examples of pre- and post-contractual fraud by the assured,¹⁸³⁷ mentions fraud in the claims stage¹⁸³⁸ which can be done for example by submitting a claim where no damage or loss occurred,¹⁸³⁹ exaggerated loss,¹⁸⁴⁰ and misrepresenting facts to be able to make the claim within the ambit of the policy.¹⁸⁴¹ Such types are somehow similar to the types of fraudulent claims in English insurance law.¹⁸⁴² Nonetheless, there is no indication if such fraud in claims is regarded as a breach of the duty of good faith.

It must be noted that the IVDRC stated that it considers the breach of good faith a fraud, and fraud vitiates the contractual relationship.¹⁸⁴³ Therefore, the insurance claims will be dropped

¹⁸³⁶ However, see the practice of the IVDRC below where it was indicated that for non-innocent breaches of the assured, the claim will be dropped or forfeited, and for innocent breaches of the insurer, the claim must be paid with compensation against any expenses or harm made to the assured; Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013); For more on remedies, see Ch 7.

¹⁸³⁷ Art 45 AFR2008.

¹⁸³⁸ Art 45 (b) AFR2008.

¹⁸³⁹ Art 45(b) (i) AFR2008.

¹⁸⁴⁰ Art 45 (b) (ii) AFR2008.

¹⁸⁴¹ Art 45(b) (iii) AFR2008.

¹⁸⁴² See above under 'Fraudulent Claims'.

¹⁸⁴³ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

or forfeited if the breach was conducted by the assured, where if the breach was committed by the insurer, the insurer has to pay the claim together with any compensation against any expenses or harm to the assured.¹⁸⁴⁴ It must be noted that the IVDRC later stated that it does distinct between innocent and non-innocent breaches of good faith, which contradicts with the impression that it did not when it stated that the breach of good faith is considered fraud.¹⁸⁴⁵ Therefore it is more likely that what is meant is that there is a distinction between innocent and non-innocent breaches of good faith, and by looking at the remedies that the IVDRC provided, it seems more likely that fraudulent claims are considered a non-innocent breach of good faith by the assured and the insurance claim will be forfeited; however, there is unclarity if that means forfeiting previous valid claims as well or if they will remain unaffected. Also there is unclarity as regards the exact fate of the policy and subsequent claims.¹⁸⁴⁶

It must be noted that even English insurance case law decided that fraudulent claims are to be treated separately from the duty of good faith;¹⁸⁴⁷ it wrestled for some time with the idea of fraudulent claims being part of the continuing duty of good faith.¹⁸⁴⁸ The author does not favour considering fraudulent claims and good faith as different issues, as fraud is the most

¹⁸⁴⁴ Ibid.

¹⁸⁴⁵ Ibid.

¹⁸⁴⁶ Ibid.

¹⁸⁴⁷ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469; *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802; See above.

¹⁸⁴⁸ *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437 ; *Continental Illinois National Bank of Chicago v Alliance Assurance Co Ltd (The Captain Panagos)* [1986] 2 Lloyd's Rep 470 ; See also *Insurance Corporation of the Channel Islands v McHugh and Royal Hotel Ltd (No1)* [1997] LRLR 94.

evident violation of good faith.¹⁸⁴⁹ It seems that such separation in treatment in English insurance law between fraudulent claims and the duty of good faith was justified on a remedial rather than doctrinal basis. In other words, the separation was to mitigate the harsh results of avoidance *ab initio* for breaching the continuing duty of good faith and not as a result of rejecting the idea that a fraudulent claim can be a part of the doctrine of good faith. The matter of whether or whether not fraudulent claims are to be part of the duty of good faith does not carry much significance in Saudi insurance law as the remedies available for breaching the duty of good faith are not clear and mostly will be filled with the insurer's own terms, and will be subject to the practice of the IVDRC mentioned earlier, where it most probably will be considered a non-innocent breach of good faith, and the claim will be forfeited.¹⁸⁵⁰ In respect of damages for late payment of claims by insurers, they are provided in Saudi Arabia for the unified compulsory motor insurance policies (UCMIP),¹⁸⁵¹ but it is not clear if they are also provided generally with regard to other types of policies.¹⁸⁵² Classifying prompt settlement of claims by the insurer as being part of the continuing duty of good faith is not clear, even though there is no reason why it should not be classified as such. However, the issue of such classification is not that significant considering that the remedies

¹⁸⁴⁹ That does not mean that the remedy of breaching the duty of good faith generally and the fraudulent claim should be exactly the same; See Ch 7 under 7.4 for more.

¹⁸⁵⁰ It must be noted that, as stated earlier, the IVDRC considered the remedy for non-innocent breach of good faith that the insurance claim will be dropped if it was done by the assured, while if it was done by the insurer, he will have to pay the claim with any compensation against expense and harm occurred by the assured; Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

¹⁸⁵¹ Art 8(6) UCMIP.

¹⁸⁵² See above, the IMCOCR2008 in article 52(k) mentions that there must be unjustified delay by the insurers in settling the claims, but does not provide a clear remedy in case of the insurer's breach.

for breaching good faith are not clearly stipulated in the law, as will be seen later.¹⁸⁵³ It must be noted that the IVDRC provides that in the case of the insurer's non-innocent breach of good faith, the insurer has to pay the claim provided it satisfied the conditions, with any compensation against the expenses and harm caused to the assured by such non-innocent breach.¹⁸⁵⁴ Therefore, it seems that the non-innocent breach of the duty imposed on the insurer to settle the claims promptly without unjustified delay can be included within the non-innocent breach of good faith mentioned by the IVDRC, and the remedies above may apply.¹⁸⁵⁵

¹⁸⁵³ See Ch7 for the remedies.

¹⁸⁵⁴ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

¹⁸⁵⁵ See above under 5.

5.10 BURDEN OF PROOF AND WAIVER

I English Insurance Law:

Burden of Proof:

For the assured to claim indemnity, certain facts must be proved. Firstly, the assured must show that a policy was actually issued for his protection, then he must prove that he has suffered an incidental loss, and that the loss is caused by an incident covered by the policy.¹⁸⁵⁶ Establishing that there was a misrepresented or omitted fact, and that it was material,¹⁸⁵⁷ and that the actual insurer was induced by such facts,¹⁸⁵⁸ are defensive allegations by the insurer. Consequently, he will be the only one who carries the burden to prove them and persuade them.¹⁸⁵⁹

However, a point which may create a bit of distress must be clarified. As discussed earlier, proving materiality may actually be enough to presume inducement without actually having to prove it.¹⁸⁶⁰ Thus, it may be said that if materiality was proved by the insurer, there is no

¹⁸⁵⁶ *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1984] 2 Lloyd's Rep 555, [1985] 2 Lloyd's Rep 1; *Brownsville Holdings Ltd v Adamjee Insurance Co Ltd (The Milasan)* [2000] 2 Lloyd's Rep 458.

¹⁸⁵⁷ MIA1906, ss 18 (2), 20(2); for more on proving materiality and the presumption of materiality, see 5.7, and below.

¹⁸⁵⁸ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 58.

¹⁸⁵⁹ See *Davies v National Fire & Marine Insurance Co of New Zealand* [1891] AC 485; *Joel v Law Union & Crown Insurance Co* [1908] 2 K.B863; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 58.

¹⁸⁶⁰ See above under 5.8 for more detailed explanation on the presumption of inducement; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 [619]; *St Paul Fire Insurance Co (UK) Ltd*

further need to prove inducement. Nonetheless, this is a wrong comprehension of the law. The presumption of inducement is applied only as an exception derived from the special nature of materiality, and it is only *prima facie*, i.e. can be refuted.¹⁸⁶¹ This special nature derives if there is a logical inference that proving something is proving the other, or when the proof is only within the control of one of the parties against who made the presumption, which accords with the general law of contract in presuming inducement.¹⁸⁶² Nonetheless, this it is not evident in materiality as it concerns a prudent insurer, not the actual one. Further, the proof is not under the control of the assured; instead it is only within the control of the insurer.¹⁸⁶³ In the draft clauses of the forthcoming Insurance Contract Law Draft Bill issued

v McDonnell Dowell Constructors Ltd [1995] 2 Lloyd's Rep 116; See also *James v CGU Insurance Plc* [2002] Lloyd's Rep IR 206 (Moore-Bick J).

¹⁸⁶¹ See above under 5.8; *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577 [59], [87] (Clarke LJ); *St Paul Fire and Marine Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep [127] (Evans LJ). The presumption is of fact and not of law; See above under 5.8 for more.

¹⁸⁶² *Smith v Chadwick* (1884) 9 AC 187 (HL); Lord Mackay of Clashfern, *Halsbury's Law*, vol 31 (4th edn, LexisNexis Butterworths 1991) para-1067; See Ch 4 under 4.4 for more about inducement in general law of misrepresentation.

¹⁸⁶³ T. Schoenbaum, 'The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law' (1998) 29 *Journal of Maritime Law and Commerce* 1, 29-30.

recently,¹⁸⁶⁴ the insurer will carry the burden to prove that the qualifying breach of the duty to make a fair presentation of the risk by the non-consumer assured is deliberate or reckless.¹⁸⁶⁵

In respect of consumer insurance contracts, the CIA2012 provides that the insurer will carry the burden to prove that the qualifying misrepresentation is deliberate or reckless. Nonetheless, the aforementioned misrepresentation is presumed subject to certain conditions, as section 5 (5) of the CIA2012 provides:

“But it is to be presumed, unless the contrary is shown—

(a) that the consumer had the knowledge of a reasonable consumer, and

*(b) that the consumer knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer.”*¹⁸⁶⁶

Waiver:

MIA1906

In respect of the waiver, section 18 (3) (c) of the MIA1906, which applies to business insurance, provides that with the absence of any questions, any circumstances which their information is waived by the insurer need not be disclosed by the assured. Since the statutory instrument does not provide indications about the instances of waiver, it was case law which developed the principle dramatically.¹⁸⁶⁷

¹⁸⁶⁴ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm> > accessed in 28 March 2014.

¹⁸⁶⁵ Insurance Contract Law Draft Bill, cl 7(6).

¹⁸⁶⁶ CIA2012, s 5(5).

¹⁸⁶⁷ See below.

Waiver of disclosure by the insurer can be through express terms or it can be implied and inferred from the insurer's conduct, which will be more difficult to prove.¹⁸⁶⁸

In respect of express terms, the matter will depend on the construction of the express term and what it restricts in particular. One form of express waiver can be by including a clause limiting the insurer's right to avoid the contract for non-disclosure or misrepresentation made by the assureds or their agents.¹⁸⁶⁹ It was established that such a clause does not go further to include fraudulent misrepresentation as a matter of public policy.¹⁸⁷⁰ Nonetheless, if the clause excluded the duty of good faith as a whole, no disclosure will be required even if the information is withheld fraudulently.¹⁸⁷¹

Another form of express waiver can be by having a clause which limits the agent's or the broker's authority to provide statements on behalf of the assured.¹⁸⁷² However, the terms of

¹⁸⁶⁸ R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-069-6-073.

¹⁸⁶⁹ *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] Lloyd's Rep IR 191, [2003] UKHL 6, [2003] Lloyd's Rep IR 230.

¹⁸⁷⁰ *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] Lloyd's Rep IR 191, [2003] UKHL 6, [2003] Lloyd's Rep IR 230; See also: *Svenska Handelsbanken v Sun Alliance and London Insurance Plc* [1996] 1 Lloyd's Rep 519; *Sumitomo Bank Ltd v Banque Bruxelles Lambert SA* [1997] 1 Lloyd's Rep 487.

¹⁸⁷¹ *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] Lloyd's Rep IR 191, [2003] UKHL 6, [2003] Lloyd's Rep IR 230 ; It must be noted that this matter was not considered by the House of Lords ; See : R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-069.

¹⁸⁷² *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] Lloyd's Rep IR 191, [2003] UKHL 6, [2003] Lloyd's Rep IR 230 ; See: R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-069.

the clause must be really clear in this respect in order to find waiver.¹⁸⁷³ In *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank*,¹⁸⁷⁴ the clause was not very clear in this effect and therefore it was found that it was not intended to limit the broker's authority to make statements on behalf of the assured.¹⁸⁷⁵

Also, waiver of disclosure by the insurer can be by including a clause which relieves the assured from the duty of utmost good faith entirely, making all the facts immaterial, or including a clause limiting the duty of disclosure to certain circumstances or information (waiving other information).¹⁸⁷⁶ Finding waiver in these clauses will depend on the construction of the clause and whether it is enough to find waiver.¹⁸⁷⁷ The House of Lords in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank*¹⁸⁷⁸ held that the wording of a clause in the policy¹⁸⁷⁹ did not have the effect of relieving the assured from the results of

¹⁸⁷³ Ibid.

¹⁸⁷⁴ [2001] EWCA Civ 1250, [2001] Lloyd's Rep IR 191, [2003] UKHL 6, [2003] Lloyd's Rep IR 230.

¹⁸⁷⁵ *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] Lloyd's Rep IR 191, [2003] UKHL 6, [2003] Lloyd's Rep IR 230.

¹⁸⁷⁶ R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-069.

¹⁸⁷⁷ *Svenska Handelsbanken v Sun Alliance & London Insurance Plc* [1996] 1 Lloyd's Rep 519; *Brotherton v Aseguradora Colseguros SA (No3)* [2003] EWHC 1741 (Comm), [2003] Lloyd's Rep IR 762.

¹⁸⁷⁸ [2001] Lloyd's Rep IR 191, [2003] UKHL 6, [2003] Lloyd's Rep IR 230.

¹⁸⁷⁹ Phrase 6 of the Truth Statement Clause in the policy provided that “*the Insured will not have any duty or obligation to make any representation, warranty or disclosure of any nature, express or implied (such duty and obligation being expressly waived by the insurers)*”

non-disclosure of his broker of material information or his misrepresentation.¹⁸⁸⁰ Also, he will not be relieved when he provides false material information on a voluntary basis. It was submitted that the goal of the clause in this case is only to put the onus of disclosure on the brokers, and to remove any onus of disclosure from the assured, not to waive the duty of utmost good faith as a whole.¹⁸⁸¹

The past case established that there will be no automatic implication of waiver as regards the independent duty of disclosure required by the broker, when the duty is waived by express terms from the assured, as the matter will depend on the construction of the clause in question.¹⁸⁸² In particular, when the duty of utmost good faith is restricted as a whole, giving an effect of immateriality to all the information, the duty will be relieved from both the assured and the broker or agent.¹⁸⁸³ On the other hand, if the clause waives specific information only, waiver will be confined to the assured's duty, and not the independent duty of the broker.¹⁸⁸⁴

¹⁸⁸⁰ *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep IR 191, [2003] UKHL 6, [2003] Lloyd's Rep IR 230.

¹⁸⁸¹ *Ibid*; The House of Lords in their decision considered that the risk covered is specialised and that the cover has been prepared by brokers, and the assured (the bank) is more likely not to have relevant information of the risk.

¹⁸⁸² *Ibid*.

¹⁸⁸³ *Ibid*.

¹⁸⁸⁴ *Ibid*.

In respect of implied waiver at first it must be noted that the assured normally must disclose all material facts within his knowledge, not only answer the questions given to him by the insurer truthfully.¹⁸⁸⁵ The general principle is that matters which are not subject to specific questions by the insurer cannot be presumed to be immaterial,¹⁸⁸⁶ or that the insurer has impliedly waived disclosure regarding them¹⁸⁸⁷, even though they may have greater possibility of ruling their immateriality.¹⁸⁸⁸ Therefore, questions in the proposal form do not relieve the assured completely from disclosing material facts not covered by the questions, even though they may eliminate the ambit of disclosure¹⁸⁸⁹ or indicate that certain matters are considered more material to the insurer.¹⁸⁹⁰

However, the principle aforementioned was not always followed, as sometimes waiver was viewed possible. One of the possibilities is when the insurer asks limited questions about certain matters, as the court in some cases regarded that the insurer has waived disclosure

¹⁸⁸⁵ *Huguenin v Rayley* (1815) 6 Taunt 186; *Wheelton v Hardisty* (1857) 8 E & B 232; *Glicksman v Lancashire & General* [1927] AC 139; *Holt's Motors v South-East Lancs Insurance* (1930) 35 Com Cas 281.

¹⁸⁸⁶ *Schoolman v Hall* [1951] 1 Lloyd's Rep 139; *Arterial Caravans v Yorkshire Insurance Co* [1973] 1 Lloyd's Rep 169.

¹⁸⁸⁷ *Arterial Caravans v Yorkshire Insurance* [1973] 1 Lloyd's Rep 169; The assured will carry the onus to prove waiver (*Roberts v Plaisted* [1989] 2 Lloyd's Rep 341; *Noblebright Ltd v Sirius International Corp* [2007] Lloyd's Rep IR 584).

¹⁸⁸⁸ *Newsholme Bros v Road Transport & General Insurance Co Ltd* [1929] 2 KB 356 [362]–[363]; *McCormick v National Motor & Accident Insurance Union Ltd* (1934) 40 Com Cas 76 [78].

¹⁸⁸⁹ *Glickman v Lancashire & General Assurance Co* [1927] AC 139.

¹⁸⁹⁰ *Hazel (for Lloyd's Syndicate 260) v Whitlam* [2004] EWCA Civ 1600, [2005] Lloyd's Rep IR 168.

regarding the other matters not included in the question.¹⁸⁹¹ It seems though that this applies when the other matters are immaterial,¹⁸⁹² and when they only concern specific limited information.¹⁸⁹³ It must be noted that this can apply only to those questions for the purpose of risk placement, not the questions aimed for other purposes, e.g. policy management, which normally occur during the policy and require limited information to be reported to the insurer.¹⁸⁹⁴

In principle, there will be no waiver of disclosure where no questions at all are asked by the insurer as that contradicts the duty of disclosure itself.¹⁸⁹⁵ However, there are propositions suggesting that even in the absence of questions from the insurer, there can be waiver of

¹⁸⁹¹ See *Revell v London General Insurance Co Ltd* (1934) 50 Ll L Rep 114; *Taylor v Eagle Star Insurance Co Ltd* (1940) 67 Ll LR 136; Those cases are motor insurance cases where limited questions on convictions have been regarded as waiver for other convictions. It must be noted that matters which are regarded as waived were immaterial in the two cases; See also *Joel v Law Union* [1908] 2 KB 863 [878]; *Norwich Union Insurance Ltd v Meisels* [2006] EWHC 2811 (QB), [2007] Lloyd's Rep IR 69.

¹⁸⁹² *Revell v London General Insurance Co Ltd* (1934) 50 Ll LR 114; *Taylor v Eagle Star Insurance Co Ltd* (1940) 67 Ll LR 136; *O'Kane v Jones (The Martin P)* [2003] EWHC 3470 (Comm) , [2005] Lloyd's Rep IR 174; *Cape Plc v Iron Trades Employers Insurance Association Ltd* [2004] Lloyds Rep IR 75; *Doheny v New India Assurance Co Ltd* [2004] EWCA Civ 1705, [2005] Lloyd's Rep IR 251; *R & R Developments Ltd v Axa Insurance Ltd* [2009] EWHC 2429 (Ch), [2010] Lloyd's Rep IR 521.

¹⁸⁹³ See *Noblebright Ltd v Sirius International Corp* [2007] Lloyd's Rep IR 584, where the possibility of waiver is rejected because the formulation of the waived information by the assured was too general and uncertain; See also *Synergy Health (UK) Ltd v CGU Insurance Plc and others* [2003] EWHC 3470 (Comm), [2004] 1 Lloyd's Rep 389.

¹⁸⁹⁴ *Moore Large & Co Ltd v Hermes Credit & Guarantee Plc* [2003] EWHC 26 (Comm) , [2003] Lloyd's Rep IR 315.

¹⁸⁹⁵ *Arterial Caravans Ltd v Yorkshire Insurance Co Ltd* [1973] 1 Lloyd's Rep 169.

disclosure, especially where there is no warning of the duty of disclosure in the proposal form.¹⁸⁹⁶ The existence of waiver by the court will rely on the terminology of the question asked,¹⁸⁹⁷ and this formulation will allow for the finding of more cases of implied waiver of disclosure.¹⁸⁹⁸ An evident case of such waiver of disclosure can be seen where there is no proposal form at all, and therefore no warning of the duty of disclosure, which is usually the case in ancillary insurance, which is usually conducted via an intermediary and not via the insurer. It was held in *Johnson v IGI Insurance Co Ltd*¹⁸⁹⁹ that insurers waived their right of disclosure, and could not rely on non-disclosure by the assured of material information regarding his health in a medical insurance policy which was conducted ancillary to a financing agreement, as there was no proposal form containing any questions in this regard. Also, waiver of disclosure where there are no questions by the insurer cannot be imagined unless the assured has been guided to believe that there is a limited disclosure duty, because of the insurer's way in demanding the information required.¹⁹⁰⁰

¹⁸⁹⁶ *Hair v Prudential Assurance* [1983] 2 Lloyd's Rep 667.

¹⁸⁹⁷ *Doheny v New India Assurance Co Ltd* [2004] EWCA Civ 1705, [2005] Lloyd's Rep IR 251.

¹⁸⁹⁸ *Roberts v Plaisted* [1989] 2 Lloyd's Rep 341; *Economides v Commercial Union Assurance Co Plc* [1997] 3 All ER 635 ; *Johnson v IGI Insurance Co Ltd* [1997] 6 Re LR 283; *International Lottery Management Ltd v Dumas* [2002] Lloyd's Rep IR 237.

¹⁸⁹⁹ [1997] 6 Re LR 283.

¹⁹⁰⁰ See *Orakpo v Barclays Insurance Services Ltd* [1995] LRLR 443, in this case the assured argued that boxes in the proposal form marked yes or no, did not allow for more disclosure; however, the Court of Appeal rejected the argument as an honest assured can always find a solution. Nonetheless, this may not be the case especially in online applications where there is a room only for answering questions; therefore even if the assured wanted to make full disclosure, he cannot.

Another issue to stress is when the insurer does not make more inquiries and go on to issue the policy, when he had the chance of querying the information given to him by the assured. In such situations, generally courts will consider that the insurer has waived his right for further information.¹⁹⁰¹ It was held in *Mann, MacNeal & Steeves v Capital & Counties Insurance Co*¹⁹⁰² that a hull insurer has waived his right for more information when he was given information by the assured that the ship had cargo, and went on to issue the policy without further inquiries about its nature which turned out to be petrol. This rule applies when the assured has given sufficient information alerting the insurer that there is more material information,¹⁹⁰³ or when insurers have known themselves something which can raise inquiry.¹⁹⁰⁴ The standard here will be the fair presentation of the risk: only when the assured has presented the risk fairly, can there be a case against the insurers for failing to ask more

¹⁹⁰¹ *Wheelton v Hardisty* (1857) 8 E & B 232 [269]–[270] (Campbell L); *Mann, MacNeal & Steeves Co Ltd v Capital & Counties Insurance Co Ltd* [1921] 2 KB 300; *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1994] 3 All E.R. 581; *Rendall v Combined Insurance Co of America* [2005] EWHC 678 (Comm), [2006] Lloyd's Rep IR 732; *Scottish Coal Co Ltd v Royal and Sun Alliance Plc* [2008] EWHC 880 (Comm), [2008] Lloyd's Rep IR 718.

¹⁹⁰² [1921] 2 KB 300.

¹⁹⁰³ *Ayrey v British Legal & United Provident Assurance Co Ltd* [1918] 1 KB 136; See *Anglo-African Merchants Ltd v Bayley* [1970] 1 QB 311, where the term “new men's clothes” when describing clothes was not considered enough to alert the insurer that the clothes were only “unused”, and in reality they were 20 years old; Also see *New Hampshire Insurance Co v Oil Refineries Ltd* [2003] Lloyd's Rep IR 386, where it was deemed that the limited disclosure given by the assureds (claims made in the last five years and up to the date of placement) did not alert the insurer for the existence of further material information (claims which were more than five years old, but were not settled yet at the date of the policy), and therefore there is no waiver of disclosure by the insurer.

¹⁹⁰⁴ *Carter v Boehm* (1766) 3 Burr 1905; *Roberts v Plaisted* [1989] 2 Lloyd's Rep 34.

reasonable questions on the basis of the actual disclosure.¹⁹⁰⁵ The insurer will be deemed to have waived his right of disclosure if he proceeds with the insurance without any further questions after the risk is fairly presented, and containing material facts in the view of a reasonable insurer.¹⁹⁰⁶

Hence, questions in the proposal form which are left blank do not alert the insurer that there is more material information, as they may only indicate a negative response to the question.¹⁹⁰⁷ Also, there will be no waiver if the assured made a positive misrepresentation and rejected the fact of having material information.¹⁹⁰⁸ In the event of ambiguous questions in the proposal form, they will always be construed for the benefit of the assured if the

¹⁹⁰⁵ *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1993] 2 Lloyd's Rep 503; *Newbury International Ltd v Reliance National Insurance (UK) Ltd* [1994] 1 Lloyd's Rep 83; *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430, *Glencore international AG v Portman* [1997] 1 Lloyd's Rep 225.

¹⁹⁰⁶ *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430; More recently *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764; *Doheny v New India Assurance Co Ltd* [2004] EWCA Civ 1705, [2005] Lloyd's Rep 251; *Garnat Trading & Shipping (Singapore) Pte Ltd and Another v Baominh Insurance Corporation* [2010] EWHC 2578 (Comm), [2011] 1 Lloyd's Rep 589.

¹⁹⁰⁷ *Roberts v Avon Insurance* [1956] 2 Lloyd's Rep 240.

¹⁹⁰⁸ *Harrower v Hutchinson* (1870) LR 5 QB 584; *Greenhill v Federal Insurance Co Ltd* [1927] 1 KB 65; *Arterial Caravans Ltd v Yorkshire Insurance Co Ltd* [1973] 1 Lloyd's Rep 169; *Container Transport International v Oceanus Mutual Underwriting Association* [1984] 1 Lloyd's Rep 476; *Aiken v Stewart Wrightson Members Agency Ltd* [1995] 3 All ER 449; *Stowers v GA Bonus Plc* [2003] Lloyd's Rep IR 402; *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 1705 (Comm), [2011] Lloyd's Rep IR 101 .

proposal becomes part of the insurance contract.¹⁹⁰⁹ It must be noted that where the insurer was aware of the existence of further material information and asked the assured more about them, the assured's distortion which prevents the insurer from having the non-disclosed facts will avert the consideration of waiver.¹⁹¹⁰

The sufficiency of the insurer's alertness as regards the existence of further material information on the basis of the assured's disclosure was considered in *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA*¹⁹¹¹ by the Court of Appeal, even though the point was not necessary to reach the decision in the case.¹⁹¹² The issue of waiver of disclosure to the existence of Rolex watches in the consignment by the reinsurers was discussed. The reassureds (Grupo) in favour of the waiver of disclosure by the reinsurers argued that the reinsurers (WISE) were sufficiently alert to the existence of further material information in the disclosure made by them. The indication of "clocks" in the slip, together with information of regular deliveries of high quantities and values to Mexico, as well as the

¹⁹⁰⁹ Following the *contra proferentem* principle in common law; J. Birds, *Modern Insurance Law* (9th edn, Sweet & Maxwell 2013) 128.

¹⁹¹⁰ *Hill v Citadel Insurance Co Ltd* [1997] LRLR 167.

¹⁹¹¹ [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764.

¹⁹¹² In the case, there was policy issued covering a consignment of goods to be sent to a retailer based in Cancun in Mexico which is a first class resort. The nature of the goods was described as "clocks" in the proposal given to the London reinsurers, where in fact it was mistranslated from the original Spanish term which included clocks and watches. Actually, the consignment contained expensive Rolex watches which were stolen. It was found at first instance that the fact of having expensive Rolex watches in the consignment was material and there was inducement to the reinsurers. The majority of the Court of Appeal supported inducement, but did not discuss materiality as it was not appealed, and ruled that there was affirmation of the policy by the reinsurers, after their knowledge of their right of avoidance.

fact that the slip was translated from Spanish to English by a person who did not have English as his first language, must have alerted a prudent underwriter to ask more questions, but as the underwriters did not, there will be a waiver of disclosure. The first instance judge found in favour of the reinsurers, and rejected the waiver argument, as reinsurers reinsuring with a broker in the London market have the right to accept the risk on “face value” as described without further inquiries. However, he indicated that a more detailed inquiry by the reinsurers could have revealed that the consignment had Rolex watches.

The majority of the Court of Appeal refused the argument of Grupo and the existence of waiver supporting the first instance judgment. Nonetheless, divergence can be observed regarding the principle. The majority view (Longmore LJ & Peter Gibson LJ) was that reinsurers were not obliged to ask further questions after the reassured’s disclosure and have the right to depend on what is told by the reassureds on “face value ” where it is clear that there is no further material information raising doubts for a reasonable insurer.¹⁹¹³ The test was two fold according to Longmore LJ: ¹⁹¹⁴ was the risk presented in an unfair manner, and if that was the case, were the reinsurers placed in a position where there were indications of further material information by the disclosure of the assureds which would give a reasonable reinsurer doubt about other material facts which are not disclosed?¹⁹¹⁵ For the

¹⁹¹³ *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764 [104]-[117] (Longmore LJ), [130]-[133] (Peter Gibson LJ) ; See also *CTI v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476 [529] (Stephenson LJ) where it was stated that even the insurer is allowed to accept risk as “face value” this does not mean he can shut his eyes about facts “*through negligence or stupidity or inexperience or pig-headedness*” and not ask further questions asked by a reasonable insurer.

¹⁹¹⁴ Applying *CTI v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476.

¹⁹¹⁵ *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764 [104]-[117] (Longmore LJ).

first question, he supported that there was no fair presentation of the risk as the fact of having Rolex watches in the shipment is material and must have been disclosed.¹⁹¹⁶ For the second question, he supported the judge in the first instance in that the reinsurer has the right to accept the risk as described “on face value”.¹⁹¹⁷ Hence, the appeal was rejected. Accordingly, to find waiver it is not sufficient to say that a more careful insurer may have asked further questions.¹⁹¹⁸ Peter Gibson LJ stated that the duty of making a fair presentation of the risk cannot be divided through “*finding that the reinsurers were put on inquiry and failed to discover for themselves the material information save in a clear case.*”¹⁹¹⁹ It was held that no waiver can be considered and the fact of stating that the nature of the goods were clocks, and that Cancun was a resort for the rich, cannot put a prudent reinsurer on notice of further material information and asking more questions.¹⁹²⁰

On the other hand, the minority view (Rix LJ) did not support such formulation and decision based on two reasons: firstly, fair presentation of the risk and waiver cannot be treated on a separate manner, as assessment of unfairness in the presentation of the risk contains further inquiry on the facts which are not disclosed, and which are “unusual”, and negatively affect

¹⁹¹⁶ Ibid.

¹⁹¹⁷ Ibid.

¹⁹¹⁸ Ibid.

¹⁹¹⁹ *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764 [130]-[133] (Peter Gibson LJ).

¹⁹²⁰ *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764.

the risk presentation.¹⁹²¹ This highlights that the assured cannot benefit from waiver if there is unfairness on his part, but that does not mean that waiver does not have an independent impact.¹⁹²² The second reason is that there is a duty on the underwriters to act in good faith which requires them to ask further questions, and therefore avoidance must be fairly done according to the mutual duty of good faith.¹⁹²³ In his view, in this case, the risk was presented fairly, and there were no “unusual” facts which are not disclosed. The question of the nature of the goods or clocks is an obvious question which must have been asked by the reinsurers, and therefore reinsurers cannot avoid the policy (that would be violating good faith), and are considered to have waived their right of disclosure regarding such information.¹⁹²⁴

Therefore, the majority view is that there is an obligation on the assured to make a fair presentation of the risk, and when he does, the insurer will be considered to have waived disclosure of information which usually occurs with the risk. Where the information is not of this nature, the right of avoidance will still be there. Also, the underwriters can depend on what they are told by the assured as it appears on “the face of things”.¹⁹²⁵ On the other hand, the minority view is that there is an obligation on the assured to make a fair presentation of the risk; however, the underwriters will be considered to have waived their right of disclosure of information and lost their right to avoid, except if the information non-disclosed was

¹⁹²¹ Ibid [46] – [81] (Rix LJ).

¹⁹²² *Iron Trades Mutual Insurance Co Ltd v Companhia de Seguros Imperio* [1991] 1 Re LR 213 (Hobhouse J).

¹⁹²³ *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764 [46]- [81] (Rix LJ).

¹⁹²⁴ Ibid [46] –[81] (Rix LJ).

¹⁹²⁵ R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-073.

“exceptional” or “unusual”, as here the right of avoidance will be retained and there will be no waiver of disclosure.¹⁹²⁶

Finally, section 18(3) (d) of the MIA1906 provides that where there are no questions by the insurer, the assured does need to disclose facts which are covered by an express or implied warranty.¹⁹²⁷ This extends to any provisions which are not strictly warranties but do, however, have the same effect, e.g. in exclusion clauses where there is no relationship between the loss and the exclusion, disclosure of information is not needed regarding the subject of the exclusion.¹⁹²⁸

LCCP2012:

It is worth mentioning, that the LCCP 2012 suggests to codify the current case law indicating that once the business assured has disclosed information, and the information gives rise to prompt questions by a reasonable insurer, the insurer should ask those questions or he will be deemed to have waived the duty to disclose concerning the information which could have

¹⁹²⁶ Ibid.

¹⁹²⁷ This is mostly for marine warranties, See MIA1906, ss 33-41 (*Haywood v Rodgers* (1804) 4 East 590; *Gandy v Adelaide Marine Insurance Co* (1870-71) LR 6 QB 746); See *Inversiones Manria SA v Sphere Drake Insurance Co Plc (The Dora)* [1989] 1 Lloyd's Rep 69, *Kirkaldy & Sons Ltd v Walker* [1999] Lloyd's Rep IR 410 (a warranty of inspection will overtake the duty of utmost good faith); *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No2)* [2001] Lloyd's Rep IR 291, [2001] EWCA Civ 1047, [2001] Lloyd's Rep IR 667 (a fire precaution warranty will overtake the duty of disclosure regard the operation of the precautions); *International Management Group (UK) Ltd v Simmonds* [2003] EWHC 177 (Comm), [2004] Lloyd's Rep IR 247; Compare with *O'Kane v Jones (The Martin P)* [2003] EWHC 3470 (Comm), [2005] Lloyd's Rep IR 174.

¹⁹²⁸ *International Lottery Management Ltd v Dumas* [2002] Lloyd's Rep IR 237.

been revealed by those reasonable enquiries, and will have no remedies regarding them.¹⁹²⁹ However, for other incidents of waiver, which can be encountered in section 18(3) (c) in the context of the information which need not to be disclosed by the assured, it was stated that it can be left to courts to develop.¹⁹³⁰ It should be noted that such an approach is adopted by the draft clauses of the forthcoming Insurance Contract Law Draft Bill issued recently.¹⁹³¹

Contracting Out Of The Insurance Contract Law Draft Bill:

For Consumer Insurance:

The default rules in the Insurance Contract Law Draft Bill are mandatory for consumer insurance and contracting out is prohibited.¹⁹³² Specifically, the draft Bill states that any term in the insurance contract or any other contract which will make the consumer's position worse than the default rules regarding matters of good faith, warranties, fraudulent claims' remedies, late payment of insurance claims, and terms relating to describing the loss will not have an effect.¹⁹³³ That will also apply to contract variations.¹⁹³⁴

¹⁹²⁹ LCCP2012 para 5.76.

¹⁹³⁰ Ibid 5.77.

¹⁹³¹ Insurance Contract Law Draft Bill, cl 6(1)(e) ; For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm> > accessed in 28 March 2014.

¹⁹³² Insurance Contract Law Draft Bill, cl 15.

¹⁹³³ Insurance Contract Law Draft Bill, cl 15(1); It must be noted that Part 2 as regards the duty to make fair presentation of the risk does not apply to consumer insurance, also clause 8 regards the basis of the contract clauses. Both issues are covered within the CIA2012; see Insurance Contract Law Draft Bill, cl 15(2).

¹⁹³⁴ Insurance Contract Law Draft Bill, cl 15(3); There are two exceptions that will be provided below.

For Non-Consumer Insurance:

The parties in non-consumer insurance can contract out of most of the default rules in the Insurance Contract Law Draft Bill, subject to satisfying conditions of transparency.¹⁹³⁵ To be specific, the Draft Bill states that any term which is disadvantageous to the assured will not have an effect, except if the insurer took enough steps to draw the assured's attention to such disadvantageous term before entering the contract,¹⁹³⁶ and the consequences of such term must be clear and unambiguous.¹⁹³⁷ A disadvantageous term is a term which puts the assured in a position worse than the default rules in the draft Bill.¹⁹³⁸ The circumstances surrounding the transaction, and the characteristics of the type of the assured involved, are both considered in deciding if the transparency conditions are satisfied.¹⁹³⁹

Contracting out is subject to two exceptions, namely: the basis of the contract clauses and the deliberate and reckless late payment of insurance claims.¹⁹⁴⁰ Using the basis of the contract clauses converting the pre-contractual representations of the proposer into warranties is prohibited in the draft Bill,¹⁹⁴¹ and parties cannot contract out of such position.¹⁹⁴²

¹⁹³⁵ Insurance Contract Law Draft Bill, cl 17.

¹⁹³⁶ Ibid, cl 17(2).

¹⁹³⁷ Ibid, cl 17(3).

¹⁹³⁸ Ibid, cl 17(1).

¹⁹³⁹ Ibid, cl 17(4).

¹⁹⁴⁰ Ibid, cl 16.

¹⁹⁴¹ Ibid, cl 8.

¹⁹⁴² Ibid, cls 16(2), 16(3) (a).

For paying the insurance claim in a reasonable time, in general the parties can contract out of such rules and the implied term, where the insurer can exclude or limit its liability for breaching the duty to pay the insurance claim in a reasonable time, or can state that the implied term will not be applicable to certain insurance contracts, provided satisfying the conditions of transparency.¹⁹⁴³ Nonetheless, such contracting out will not be allowed if failing to pay the insurance claim in a reasonable time is deliberate or reckless.¹⁹⁴⁴ The breach will be deliberate or reckless if the insurer knew that he was in breach of the implied term, or did not care whether he was in breach of the implied term or not.¹⁹⁴⁵

Settlement Agreements:

It must be noted that the rules on contracting out as stated above are not applicable to settlement agreements. Therefore, in consumer insurance using less favourable terms than the default provisions in the Insurance Contract Law Draft Bill is allowed as the prohibition will not be applicable.¹⁹⁴⁶ Also, the conditions of transparency will not be needed for non-consumer insurance.¹⁹⁴⁷

¹⁹⁴³ Ibid, cl 13(1).

¹⁹⁴⁴ Ibid, cls 16(2), 16(3) (b).

¹⁹⁴⁵ Ibid, cl 16(5).

¹⁹⁴⁶ Ibid, cl 15(4).

¹⁹⁴⁷ Ibid, cl 16(6).

Cancellation Clauses:

The insurer can put a cancellation clause which allows him to terminate the insurance contract in the future after certain circumstances appear.¹⁹⁴⁸ The insurer then can cancel the contract after a notice given to the assured and must return the premiums paid.¹⁹⁴⁹ Those cancellation clauses are not forbidden by the Insurance Contract Law Draft Bill since their effect is subsequent to the contract, and therefore will not put the assured in a worse position than the Bill which mainly deals with the pre-contractual duty.¹⁹⁵⁰ The assureds will be alerted to the absence of insurance cover and will seek a new cover.¹⁹⁵¹ Therefore, there is no need even for the transparency requirements for such clauses as they are not regarded as contracting out of the draft Bill.¹⁹⁵²

II Saudi Insurance Law:

In contrast to English Insurance law, Saudi insurance law does not address issues of waiver and the burden of proof regarding the duty of good faith required in the insurance contract.

¹⁹⁴⁸ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Mar 2014) found in http://lawcommission.justice.gov.uk/docs/accompanying_notes_March2014.pdf accessed in 28 March 2014, para 4.23.

¹⁹⁴⁹ Ibid.

¹⁹⁵⁰ Ibid.

¹⁹⁵¹ Ibid.

¹⁹⁵² Ibid, para 4.33.

Thus, it is obvious that there is a legal gap regarding these matters and it will be necessary to find the law that can be resorted to in such cases.

Article 11 of the IMCOCR2008 states clearly that the reference in case of a legal vacuum regarding the insurer's duties will be to the best practices used internationally, and not to the general contract law or the CCL1931. This was confirmed by the IVDRC, which states that it applies well known insurance principles applied in other jurisdictions after a careful interpretation of the policy provisions.¹⁹⁵³

This approach raises some concerns and questions. Firstly, the “internationally best practices” is an ambiguous concept to nominate as a reference in case of legal gaps. It is not clear what is meant by “practices”. Is it laws, regulations, or guidance laws, such as the laws produced by the United Nations? Moreover, what it meant by “followed internationally”? Countries do not follow one practice or one law as every country is different from the other, in its laws and regulations. Thirdly, the section determines the insurer as a reference to select these best practices internationally. This assignment has its dangers in the sense that the insurer may not select the best practices for the assured, but what is best to fit his interests, as it must be remembered that no restrictions are placed on the freedom of the insurer in that regard.

The author's opinion is that in case of a legal vacuum, the reference must be to the general contract law in Saudi Arabia, i.e. Islamic contract law according to the *Hanbali* teaching. Firstly, this coincides with what is applied in almost all countries in the world, where if there is a legal gap, the general law is applied within the laws of the same country. Secondly, following the practices of another country, even if it is better for the assured, increases uncertainty and it can contradict Saudi laws and regulations. There may be internationally accepted practices which cannot be applied in Saudi Arabia as an Islamic country which only allows cooperative insurance. Finally, using laws and regulations of other countries can raise

¹⁹⁵³ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

sovereignty issues as it involves applying other countries' laws and regulations. In contrast, applying general contract law as a reference for any legal gap can avoid such pitfalls, since it will be easier to apply and determine. Moreover, appeals in the IMCOCR2008 used to be heard in front of *Diwan Almathalem* which applies Islamic law in its hearings.¹⁹⁵⁴ Thus, it will be more logical to consider applying Islamic law in case of a legal gap.¹⁹⁵⁵ The CCL1931 in that regard will not be suitable to apply since it is nearly an abandoned law in respect of insurance.¹⁹⁵⁶ However, with the promulgation of the JL2007, and with removing the jurisdiction of insurance appeals to a semi judicial committee, one can discern that insurance was placed more and more away from general contract law and *Sharia'a* scrutiny as applied in Saudi Arabia, which is not favourable since it leads to legal duality and inefficiency.¹⁹⁵⁷ This approach can be justified by the doubts surrounding the *Sharia'a's* conformity with the cooperative insurance model presented in the LSCIC2003.¹⁹⁵⁸

¹⁹⁵⁴ See Ch 3 for more.

¹⁹⁵⁵ Ibid.

¹⁹⁵⁶ Ibid.

¹⁹⁵⁷ See Ch 3 & Ch 8 for the author's recommendations to solve this dilemma.

¹⁹⁵⁸ See Ch 3 for more discussion.

5.11 CONCLUSION

Although the drafters of the Saudi insurance laws were guided by English insurance laws,¹⁹⁵⁹ the amount of variation between the two systems cannot be omitted. In principle, unlike the MIA1906 which introduced the duty of good faith as a unique duty for insurance contracts or *uberrimae fidei* contracts, the duty of good faith in Saudi insurance law is only normal since it is an extension of its general application to all kinds of contracts.¹⁹⁶⁰ This major disparity is due to the different priorities in each system. The economic efficiency is adhered to in English insurance law; nonetheless, obedience to the precepts of Islam in every transaction is the key driver in Saudi insurance law.¹⁹⁶¹ However, the utmost good faith as a principle embedded in section 17 of the MIA1906 has been removed by the CIA2012 for consumer assureds, and replaced by the assured's duty to take reasonable care not to make a misrepresentation¹⁹⁶². For business assureds, the LCCP2012 suggests retaining utmost good faith only as an "interpretative principle" with no remedies, and such suggestion was incorporated in draft clauses of the forthcoming Insurance Contract Law Draft Bill issued recently.¹⁹⁶³

¹⁹⁵⁹ See Ch1 ; The FSMA2000 was used in drafting the LSCIC2003 and its implementing regulations, while the MIA1906 was used by the Insurance Dispute Resolution Committees in judging insurance cases; see E. Algamdi, 'Nitham alt'amin wa aqd atam'min' *Alriyadh* (Riyadh 10 Dec 2005) <<http://www.alriyadh.com/2005/12/10/article114324.html>> accessed 24 May 2012 ; see Ch 3 for more.

¹⁹⁶⁰ See Ch 4 for more.

¹⁹⁶¹ See above under 5.2.

¹⁹⁶² Ibid; CIA2012, s 4.

¹⁹⁶³ Ibid; LCCP2012 paras 10.1–10.19 ; Insurance Contract Law Draft Bill, cl 14.

In consideration of the nature of the duty of good faith, Saudi insurance laws classify it as a prerequisite to the insurance contract derived from law and without it the contract will lose one of its cornerstones.¹⁹⁶⁴ Similarly, it is settled that the pre-contractual duty of good faith in English insurance law derives from a rule of law and not an implied term.¹⁹⁶⁵ However, the nature of the post-contractual duty is not clear as sometimes it is treated as required by law, and other times it is treated as an implied term in the contract.¹⁹⁶⁶ .

A general remark observed in Saudi insurance law is that it has an assured-friendly approach, to the extent that the IMCOCR2008 does not pronounce mutuality of good faith on part of the assured, at least in a clear manner.¹⁹⁶⁷ Another indication of this approach is the materiality test, which takes the assured and his reasonable expectations as a point of reference.¹⁹⁶⁸ On the other hand, the insurance legal environment in the UK is dominated by powerful insurers leading the legal system to be more insurer-friendly. This fact can be grasped from the materiality test in the MIA1906 which takes the prudent insurer and his judgment of taking the risk or charging a higher premium as the point of reference.¹⁹⁶⁹ Regarding mutuality, while it is true the MIA1906 announces that the duty of good faith is mutual between the parties of the contract, there is no practical use for this mutuality, since avoidance is the only remedy for the assureds.¹⁹⁷⁰ However, the CIA2012 improves the situation for consumer

¹⁹⁶⁴ See above under 5.4.

¹⁹⁶⁵ Ibid; see also 5.9.

¹⁹⁶⁶ See above under 5.4.

¹⁹⁶⁷ See above under 5.5.

¹⁹⁶⁸ See above under 5.7.

¹⁹⁶⁹ Ibid.

¹⁹⁷⁰ See above under 5.5, MIA1906, s 17.

assureds after abolishing the duty of disclosure and setting out that the consumer assured is only under a duty to take reasonable care not to misrepresent which is measured by the standard of a reasonable consumer, and that only qualifying misrepresentation can give a remedy to the insurer.¹⁹⁷¹ In respect of the LCCP2012, it suggests retaining the duty of disclosure as a default rule for business assureds who must disclose material information providing a ‘fair presentation of the risk’.¹⁹⁷² When the insurer gets information which incurs reasonable enquiries by a reasonable insurer, he must ask those reasonable questions promptly, and if he does not, he will have no remedy regarding the information which could have been revealed by such enquiries, and such an approach was adopted recently in the draft clauses of the Insurance Contract Law Draft Bill.¹⁹⁷³ The author appreciates the CIA2012 in abolishing the duty of disclosure and defends a similar approach to be applied by the IMCOCR2008, explaining the unsuitability of the reasonable expectations test as a materiality test for the duty of disclosure.¹⁹⁷⁴ However, unlike the CIA2012, the author argues that abolishment is to be applied to both consumer and business assureds.¹⁹⁷⁵

The duty of good faith in English insurance law concerning material information disclosed or represented ends when the contract is concluded.¹⁹⁷⁶ However, it is accepted that the duty of good faith generally can extend after the conclusion of the contract and end when the legal

¹⁹⁷¹ See above under 5.3, CIA2012, ss 2, 4.

¹⁹⁷² See above under 5.7.

¹⁹⁷³ See above, 5.6, 5.7.

¹⁹⁷⁴ See above under 5.7.2, 5.7.3.

¹⁹⁷⁵ See above under 5.7.4

¹⁹⁷⁶ See above under 5.9; MIA1906 ss 18, 20.

proceedings commence.¹⁹⁷⁷ The scope and nature of the post-contractual duty of good faith is less clear, and the availability of avoidance *ab initio* as the only remedy for breach make courts avoid labelling the duty as similar to the one in section 17 of the MIA 1906.¹⁹⁷⁸ Where it seems that in Saudi insurance laws, the duty is also needed on the pre- and post-contractual stage.¹⁹⁷⁹ For fraudulent insurance claims, English common law considers fraudulent claims a separate issue from the continuing duty of good faith, and that is confirmed by the Insurance Contract Law Draft Bill, while in Saudi insurance law the issue is not clear, even though it seems that fraudulent claims are more likely to breach the duty of good faith.¹⁹⁸⁰ The insurer can be breaching good faith if he delays the payment of the claim in English insurance law; however, damages cannot be payable. Nonetheless, this is subject to change after the Insurance Contract Law Draft Bill where it will be an implied term in every insurance contract to pay the sums due under the insurance contract to the assured in a reasonable time, and damages can be applicable if breached as an additional remedy.¹⁹⁸¹ On the other hand, in Saudi insurance law, the issue is not clear as regards the classification of the delay of the payment of the insurance claim as a breach of the duty of good faith, but there is no reason not to classify it as such.¹⁹⁸² Damages for late payment by the insurer are incurred by the UCMIP, but it is not clear if that will be more general for all types of policies; however,

¹⁹⁷⁷ See above under 5.9.

¹⁹⁷⁸ Ibid.

¹⁹⁷⁹ Ibid.

¹⁹⁸⁰ Ibid.

¹⁹⁸¹ Ibid.

¹⁹⁸² Ibid.

damages can be awarded if late payment was considered a non-innocent breach of good faith by the IVDRC.¹⁹⁸³

For the assured's state of mind when committing disclosure or misrepresentations, it seems to play no role in the MIA1906, even though it plays a considerable role in the CIA2012, the LCCP2012, and the Insurance Contract Law Draft Bill.¹⁹⁸⁴ In Saudi Arabia, the AFR2008 seems to distinguish between fraudulent non-disclosure and misrepresentation, and non-fraudulent non-disclosure and misrepresentation - even the remedies are not clear. The IVDRC in practice differentiates between innocent and non-innocent breaches of good faith.¹⁹⁸⁵

Different approaches are taken by the MIA1906, the CIA2012, the LCCP2012 and the Insurance Contract Law Draft Bill regarding the assured's and the insurer's knowledge, whereas the issue is not clear in Saudi insurance laws.¹⁹⁸⁶ However, an inducement requirement is only evident in English insurance laws..¹⁹⁸⁷

The duty of good faith can be waived by the insurer in English insurance law.¹⁹⁸⁸ Moreover, the insurer will carry the burden to prove any misrepresentation or non-disclosure by the business assured under the MIA1906.¹⁹⁸⁹ In the draft clauses of the forthcoming Insurance

¹⁹⁸³ Ibid.

¹⁹⁸⁴ See above under 5.6.

¹⁹⁸⁵ Ibid.

¹⁹⁸⁶ Ibid.

¹⁹⁸⁷ See above under 5.8.

¹⁹⁸⁸ See above under 5.10.

¹⁹⁸⁹ Ibid.

Contract Law Draft Bill issued recently, the insurer will carry the burden to prove that the breach of the non-consumer assured to the duty to make a fair presentation of the risk is deliberate or reckless.¹⁹⁹⁰

For consumer insurance under the CIA2012, the insurer will carry the burden to prove that the qualifying misrepresentation is deliberate or reckless, which is presumed unless the contrary is proved, if the consumer had the knowledge of a reasonable consumer, and knew the relevance of the questions asked by the insurer.¹⁹⁹¹ Nonetheless, in Saudi insurance laws issues of waiver and burden of proof are faced with a legal gap, which will be referred to the suitable international best practice.¹⁹⁹² The author, however, defends the application of the general contract law in case of a legal vacuum.¹⁹⁹³

After reviewing and comparing the nature and concept of the duty of good faith, disclosure and honest representation between English and Saudi insurance laws, the application of the duty on brokers will now be reviewed, in the next chapter. This will provide more comprehensive coverage of the duty, bearing in mind that assureds, especially businesses still use brokers for concluding insurance.

¹⁹⁹⁰ Ibid.

¹⁹⁹¹ Ibid.

¹⁹⁹² Ibid.

¹⁹⁹³ Ibid.

CHAPTER 6

INSURANCE INTERMEDIARIES AND THE DUTY OF GOOD FAITH

6.1 INTRODUCTION

Insurance markets often rely on intermediaries to help distribute, sell, and facilitate insurance operations. Those intermediaries assess their clients' insurance needs to provide them with suitable insurance products and services from insurers.¹⁹⁹⁴ In fact, insurance brokers or intermediaries carry out services for both sides of the insurance operation. For insurers, intermediaries act as a marketing network for their products and services, provide them with information about the risk to enable correct underwriting, collect premiums, saving them from dealing with customers, and control policy documents before reaching the customer.¹⁹⁹⁵ In respect of the assureds, intermediaries assist them in providing suitable cover for their needs, negotiating terms with insurers, claiming settlement, and providing continuous advice and service.¹⁹⁹⁶ Brokers or intermediaries are also used to decrease insurance costs, as they reduce 'information asymmetry' or the imbalance in information between buyers and sellers.¹⁹⁹⁷ In insurance transactions, the buyer knows more about the risk, but the seller

¹⁹⁹⁴ M. Eckardt, 'Agent and Broker Intermediaries in Insurance Markets - An Empirical Analysis of Market Outcomes' (2002) Thunen-Series of Applied Economic Theory, Working Paper No. 34. Available at SSRN:

<<http://ssrn.com/abstract=655143>> accessed 19 May 2011.

¹⁹⁹⁵ In Lloyd's market, brokers prepare the wording of the policy and the policy is construed in courts against the assured regard any ambiguity according to agency principles. See *Forsikringsaktieselskapet Vesta v Butcher (No1)* ([1989] 1 All ER 402 (HL)); *Abrahams v Mediterranean Insurance & Reinsurance Co Ltd* [1991] 1 Lloyd's Rep 216 (CA).

¹⁹⁹⁶ M. Eckardt, 'Agent and Broker Intermediaries in Insurance Markets - An Empirical Analysis of Market Outcomes' (2002) Thunen-Series of Applied Economic Theory, Working Paper No. 34. Available at SSRN:

<<http://ssrn.com/abstract=655143>> accessed 19 May 2011.

¹⁹⁹⁷ Ibid.

knows more about his products and the insurance industry. A broker comes to level out this imbalance and provide information for both parties, to allow fair calculation of the risk.¹⁹⁹⁸

The significance of the intermediaries' role depends on several factors, such as the nature of the risk, the nature and the culture of the market in question, and the type of assured seeking cover. Insurance intermediaries usually carry the burden of searching for cover for more complex risks, which cannot easily be covered by off the shelf insurance.¹⁹⁹⁹ Regarding the UK, intermediaries have played a vital role in the market for years. Insurance by Lloyd's is forbidden to be conducted directly and must be placed by a broker/intermediary.²⁰⁰⁰ Intermediaries in the Saudi insurance market somehow play a less important role than their English counterparts. However, in practice many insurers in Saudi Arabia seek to reinsure back in the London market with Lloyd's syndicates, which means that local agents and brokers delegate their responsibilities to the English placing brokers. This practice stresses issues of liabilities of good faith and disclosure among the chain of brokers. Another important point to bear in mind is that intermediaries tend to be more involved in the commercial market, where insurance cover is tailored to the specific needs of the client, and where negotiation on better terms of agreements with insurers is possible.²⁰⁰¹ Consumers may

¹⁹⁹⁸ This is known also as "adverse selection"; see J.D. Cummins, and N.A Doherty (2006) 'The Economics of Insurance Intermediaries' 73 (3) Journal of Risk and Insurance 354, 355.

¹⁹⁹⁹ See J.D. Cummins, and N.A Doherty (2006) 'The Economics of Insurance Intermediaries' 73 (3) Journal of Risk and Insurance 354, 355 .

²⁰⁰⁰ R. Merkin & J. Lowry, 'Reconstructing Insurance Law: The Law Commissions Consultation Paper' (2007) (71) (1) MLR 95, 97.

²⁰⁰¹ See J.D. Cummins, and N.A Doherty (2006) 'The Economics of Insurance Intermediaries' 73 (3) Journal of Risk and Insurance 354, 355.

deal with a local agent for a certain insurer, or a broker who searches the market for the best suitable cover, controls the completion of proposal forms, and passes them to the insurer. However, proposals now can be sent to the insurers directly, especially via the internet and over the phone.²⁰⁰²

In many kinds of insurance, especially in the commercial market, the assured relies completely on brokers in providing cover. Thus, assureds may to a certain extent be isolated from the whole insurance transaction, with brokers having the authority even to sign the policy on their behalf.²⁰⁰³ From a practical view, such a position of brokers in the market must be considered in any legal amendments or recommendations, since they are the ‘real players of the game’. The legal reforms that consider the state of mind of the assured as a way to provide justice would be meaningless in the above scenario, since assureds are not really involved in the operation themselves.²⁰⁰⁴ Hence, attention must be given to the liabilities of the intermediaries and brokers in case of errors, misrepresentation, or non-disclosure.

This chapter will attempt to compare Saudi and English insurance laws in respect of intermediaries’ duty of good faith, honest representations, and disclosure. Firstly, it will explore what exactly the legal position of the insurance intermediary is – is he an agent for the assured or the insurer? – in both laws. This is important to be able to judge the intermediary’s liability in case of misrepresentation or non-disclosure. Secondly, the duty of good faith, disclosure and honest representation required from intermediaries will be identified in both laws. Three main issues will be also considered: the independent duty of the

²⁰⁰² Ibid

²⁰⁰³ R. Merkin & J. Lowry, ‘Reconstructing Insurance Law: The Law Commissions Consultation Paper’ (2007) (71) (1) MLR 95, 97.

²⁰⁰⁴ Ibid.

intermediary in disclosure and good faith, the disclosure of commission or fees by the intermediary, and the explanation of the duty of disclosure to the clients.

The chapter is an important part of the comparison considering the vital part of the intermediaries in concluding the insurance transactions. It will contribute towards providing a comparative critical analysis of the intermediaries' duty of good faith between Saudi and English insurance laws. This will complete the conceptual comparison of the duty before moving to discuss the remedies.

6.2 INSURANCE INTERMEDIARIES AND THE DUTY OF GOOD FAITH, DISCLOSURE AND HONEST REPRESENTATION IN ENGLISH INSURANCE LAWS

6.2.1 The Legal Position Of Insurance Intermediaries

On January 2005, the UK implemented the EU Insurance Mediation Directive ‘IMD’²⁰⁰⁵ within the FSMA2000.²⁰⁰⁶ Any intermediate activity must be authorised before practice, subject to some exemptions.²⁰⁰⁷ These intermediate activities include giving recommendations, filling in proposal forms, or helping in filling in the proposal forms.²⁰⁰⁸ Many precautionary requirements are required from the intermediary, such as having professional indemnity insurance and being part of the Financial Services Compensation Scheme (FSCS) and the Financial Ombudsman Service (FOS).²⁰⁰⁹ The FOS provides

²⁰⁰⁵ Council Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation [2003] OJ L9/3.

²⁰⁰⁶ Insurance Mediation Directive (Miscellaneous Amendments) Regulations 2002, SI 2004/1473 ; Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2003, SI 2003/1476 ; Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI No 544), as amended.

²⁰⁰⁷ Ibid; the FCA Handbook, the Perimeter Guidance Manual (PERG).

²⁰⁰⁸ Regulated Activities Order, (Arranging deals in investments), art 25(1), PERG 5.6.2; Regulated Activities Order, art 25(2), PERG 5.6.4. ; Regulated Activities Order, art 53, PERG 5.8.5.

²⁰⁰⁹ The FCA Handbook, Prudential sourcebook for Mortgage and Home Finance Firms, and Insurance Intermediaries (MIPRU) 3.2.1 ; the FOS apply what is “*fair and reasonable in the circumstances*” not necessarily strict law (Financial Services and Markets Act 2000, s 228(2)) ; The compensation by the FSCS will be according to the FCA Handbook, Compensation (Comp) 2.

assureds with an easy system to pursue claims, whereas the FSCS helps the assured in recovering from the intermediary when he is insolvent.²⁰¹⁰

In respect of the definition of the insurance intermediaries, the IMD defined an insurance intermediary as,

*“Any natural or legal person who, for remuneration, takes up or pursues insurance mediation.”*²⁰¹¹

The activities of mediation are defined as,

*“The activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or concluding such contracts, or assisting in the administration or performance of such contracts, in particular in the event of a claim...”*²⁰¹²

Under the IMD, the activity is not considered a mediation if it was practised by the insurer directly or by insurer’s employees.²⁰¹³ In other words, direct underwriting is excluded from the ambit of the Directive and is not considered mediation.²⁰¹⁴ Moreover, activities practised as a secondary activity to the main business, e.g. travel insurance sold by travel agents, loss

²⁰¹⁰ Ibid.

²⁰¹¹ IMD [2003] OJ L9/3, Art 2(5).

²⁰¹² IMD [2003] OJ L9/3, Art 2(3).

²⁰¹³ IMD [2003] OJ L9/3, Art 2(3) provided in its definition for mediation activities, *“These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation”*.

²⁰¹⁴ Ibid.

adjusting, and claims management are also excluded from the Directive and are not considered mediation activities.²⁰¹⁵ .

It is vital to clarify the legal position of the insurance intermediary, whether he is an agent to the assured or an agent to the insurer, to know who is responsible for his acts, omissions, and errors. For misrepresentation by the intermediary, the matter is less complex, as provided materiality and inducement are satisfied, false statements by the assured will permit the insurer to avoid, and that also will apply to any false statement by authorised persons by the assured acting on his behalf, but not independent third parties.²⁰¹⁶ For non-disclosure, the matter is more complex, and determining the legal position of the intermediary, i.e. who he is an agent for, becomes more important for imputation of knowledge purposes as when knowledge is imputed from the agent to the principle, he will be presumed to know what the agent knows.²⁰¹⁷ For business insurance this is important, as sometimes there are material facts which the assured's agent knows, but the assured does not know about them.²⁰¹⁸ For consumer insurance, as mentioned in chapter 5, the duty of disclosure is abolished under the

²⁰¹⁵ IMD [2003] OJ L9/3, Art 2(3) provided in its definition for mediation activities that,

“The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims shall also not be considered as insurance mediation”.

²⁰¹⁶ MIA1906, s 20; *International Lottery Management Ltd v Dumas* [2002] Lloyd's Rep IR 237 (misstatement in the lawyer's opinion which was sought by the assured's brokers is not imputed on the assureds).

²⁰¹⁷ R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-035.

²⁰¹⁸ See below.

CIA2012, and any rule of law relating to section 18 and 19, and 20 of the MIA1906 is removed.²⁰¹⁹

Unfortunately, the current law is not clear yet about the legal situation of the insurance intermediary.²⁰²⁰ In principle, the insurance broker including a Lloyd's broker, is known to be an agent for the assured, even though he does some functions for the insurer e.g. reinsurance and appointing loss adjusters.²⁰²¹ Also, generally the broker is not considered an agent for the insurer unless he is under the direct control of the insurer or his employment or his appointed representative, and even so, it is possible that he is not considered as such at all times when dealing with the assured.²⁰²² However, in some cases, those who seem to be independent, non-Lloyd's brokers were viewed as the insurer's agents when they have the authority to bind cover on the insurer.²⁰²³ It was observed though that those cases must not be

²⁰¹⁹ CIA2012, s 2; s 11 (1).

²⁰²⁰ See below; See The Law Commission and Scottish Law Commission, *Insurance Contract Law: Misrepresentation, Non-Disclosure and Breach of Warranty by the Insured* (Law Com CP No182, Scot Law Com DP No 134, 2007) (LCCP2007) para 9.22.

²⁰²¹ See *Rozanes v Bowen* (1928) 32 Lloyd's Law Rep 98; *Anglo-African Merchants v Bayley* [1970] 1 QB 311 and *Roberts v Plaisted* [1989] 2 Lloyd's Rep 341; That principle was applied in commercial cases in *Arif v Excess Insurance Group* 1986 SC 31, and consumer cases as in *Winter v Irish Life Assurance plc* [1995] 2 Lloyd's Rep 274; However, there was judicial criticisms in respect to this situation for Lloyd's brokers (*Roberts v Plaisted* [1989] 2 Lloyd's Rep 341 [345] (Purchas LJ)).

²⁰²² FSMA2000, s 39(3); *Newsholme Bros v Road Transport & General Insurance Co* [1929] 2 K B 356; However being the insurer's employee or representative is not considered mediation anymore under the Directive, see IMD [2003] OJ L9/3, Art 2(3).

²⁰²³ *Stockton v Mason* [1978] 2 Lloyd's Rep 430; *Woolcott v Excess Insurance Co Ltd* [1979] 1 Lloyd's Rep 633, [1979] 1 Lloyd's Rep 231, [1979] 2 Lloyd's Rep 210.

construed as generally applicable, because of the existence of some kind of relationship between the insurer and the broker, entitling the broker to provide a temporary cover.²⁰²⁴ In a later decision to these cases, particularly in *Winter v Irish Life Assurance Plc*²⁰²⁵ the imputation of the broker's knowledge was not viewed as on the insurer.²⁰²⁶ Hence, there can be an assumption, that in the absence of a close relationship between the insurer and the independent broker, except if the broker has actual authority from the insurer, the assured cannot depend on apparent authority.²⁰²⁷ The situation of 'single tied agents' who sell products from one insurer is still not clear, even though there are some suggestions they should be included under the insurer's umbrella.²⁰²⁸ Also, the position of 'multi-tied agents' who sell products from several insurers is wholly inconsistent.²⁰²⁹ On the other hand,

²⁰²⁴ J. Birds, *Bird's Modern Insurance Law* (9th edn, Sweet and Maxwell 2013) 211.

²⁰²⁵ [1995] 2 Lloyd's Rep 274.

²⁰²⁶ In this case, the knowledge of a material fact about the assured (cystic fibrosis) by the brokers which was not disclosed to the insurer was not imputed on the insurer. The judge stated that the fact the assureds who are the ones who went to the brokers for providing coverage was vital in the decision, and the matter may be different if insurers had instructed the brokers to go to the assureds to sell insurance and gave them the name of particular links; See also *Hazel for Lloyds Syndicate 260 (t/a KGM motor policies at Lloyds) v Whitlam* [2004] EWCA Civ 1600, [2005] Lloyd's Rep IR 168 (The imputation of knowledge was not on the insurers who were entitled to avoid the policy for non-disclosure as the broker did not disclose to the insurer that the assured received training to be a golf professional besides his full-time job).

²⁰²⁷ J. Birds, *Bird's Modern Insurance Law* (9th edn, Sweet and Maxwell 2013) 211; However, there can be an exception if the insurer has bound himself by the broker's representation.

²⁰²⁸ M. Clarke, G. Burling & R. Purves., *The Law of Insurance Contracts* (6th edn, Informa 2009) para 8-2A1; Early cases are doubted see: *Bawden v London, Edinburgh and Glasgow Life Insurance Co* [1892] 2 QB 534; *Arif v Excess Insurance Group* 1986 SC 317.

²⁰²⁹ LCCP2007 paras 9.34-9.36.

independent brokers who search the market are mostly considered the assureds' agents.²⁰³⁰ It must be noted that in general agency law, the principle is liable for his agent if the agent has actual authority, which can be express or implied, apparent authority, usual authority,²⁰³¹ or by ratification of acts which are not previously authorised.²⁰³² Therefore, usually courts first try to find express agreements between the intermediary and the insurer, and whether they did give the intermediary actual authority. If there is no such express authority, implied authority can still be found.²⁰³³ Even if the intermediary was acting beyond his limits of actual authority, the principle can still be liable under apparent authority, where the principle considers his agent as having specific authority by words or conduct.²⁰³⁴ The vital element

²⁰³⁰ *Winter v Irish Life Assurance plc* [1995] 2 Lloyd's Rep 274 ; *Arif v Excess Insurance Group* 1986 SC 317; See above on the possible exceptions.

²⁰³¹ Usual authority will not be dealt with as it seems not to be apparent in insurance ; J. Birds, *Bird's Modern insurance Law* (9th edn, Sweet and Maxwell 2013) 212.

²⁰³² It is not clear however if ratification can be applied when the loss occur in marine insurance , see *Grover & Grover v Mathews* [1910] 2 KB 401 ; *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 213.

²⁰³³ For implied authority examples , see *Stockton v Mason* [1978] 2 Lloyd's Rep 430 (blank cover notes given by the insurer to the broker were considered a form of an implied authority by the insurer for his agent to issue temporary cover) ; *Zurich General Accident and Liability Insurance Co Ltd v Rowberry* [1954] 2 Lloyd's Rep 55 (In this case, the assured was the principle, and it was held that the assured is bound by the broker's mistake in the proposal form regarding the destination of travel as he gave him the authority to negotiate the proposal form , but particular instruction for the destination was absent.).

²⁰³⁴ For example, see *Freeman & Lockyer v Buckhurst Park Properties Ltd* [1964] 2 QB 480.

here is the principle's representation to the third party, disregarding the agent's statement or fraudulent conduct.²⁰³⁵

In non-disclosure, the agent's knowledge is imputed on the insurer when the agent is considered to have authority to obtain the information.²⁰³⁶ Nonetheless, this may not be the case if there is a false answer in the proposal form, even if the agent knows the true position.²⁰³⁷ The person obtaining the information must also appreciate its importance.²⁰³⁸ The type of knowledge imputed will rely on whether the intermediary has actual or apparent

²⁰³⁵ *Eagle Star Insurance Co v Spratt* [1971] 2 Lloyd's Rep 116 ; *Wilkinson v General Accident Fire & Life Assurance Corp Ltd* [1967] 2 Lloyd's Rep 182 ; See also : *Brook v Trafalgar Insurance Co* (1946) 97 LIL Rep 365 (receiving loss notifications by the agent, when the agent is the person whom the assured at all times dealt with is binding on the insurer, except in the case of an express sign which provides otherwise); It must be noted that for the purposes of filling the proposal form on the assured's behalf, except if the broker has actual authority, the broker will not bind the insurer as he will not be considered as having apparent authority (*Newsholme Brothers v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356).

²⁰³⁶ *Woolcott v Excess Insurance Co Ltd* [1979] 1 Lloyd's Rep 633, [1979] 1 Lloyd's Rep 231, [1979] 2 Lloyd's Rep 210.

²⁰³⁷ *Newsholme Brothers v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356.

²⁰³⁸ *Mahli v Abbey Life Assurance Co* [1994] CLC 615.

authority.²⁰³⁹ However, the imputation of knowledge was never possible when the agent defrauds his principle.²⁰⁴⁰

For the issue of the imputation of knowledge and the proposal form, case law has developed an approach of “transferred agency” or what is called the “The *Newsholme* rule” in the leading case *Newsholme Brothers v Road Transport and General Insurance Co Ltd*.²⁰⁴¹ The rule set in the case is that even if the broker is the insurer’s agent, he will cease to be as such when assisting the clients in completing the proposal forms. In other words, for the purpose of filling the proposal forms, the broker will be the agent of the assured, even though he is the agent for the insurer for all other purposes, therefore his knowledge will not be imputed on the insurer.²⁰⁴² The case regarded a motor insurance policy where there was a warranty on the truth of the statements in the proposal form; however, the proposal form contained incorrect answers relating to previous losses. The agent of the insurer which was authorised for investigations related to the proposal form but not to effect insurance knew the truth, and was given the correct answers by the assureds. It was found that his knowledge is not imputed on the insurer, but on the assured and therefore the insurer has the right to avoid the contract. The arguments behind such an approach are: assureds must be bound by what they sign, the

²⁰³⁹ For example, a local insurer’s representative situated in a branch office, will be considered probably as having knowledge of material facts disclosed to him by the assured as he will be considered to have authority to obtain such information. However, he may not have a wider authority and therefore imputation of knowledge regarding other wider matters is doubted, but subject to the policy terms, See *Wing v Harvey* (1854) 4 De GM & G 265; *Ayrey v British Legal & United Provident Assurance* [1918] 1 KB 136.

²⁰⁴⁰ *PCW Syndicates v PCW Reinsurers* [1996] 1 All ER 774; *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 All ER 791.

²⁰⁴¹ [1929] 2 KB 356.

²⁰⁴² *Newsholme Brothers v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356.

agent will be of the assured, when the assured demands that he fills the proposal form, and the agency must cease if the broker has filled the form with false answers fraudulently i.e. knowing that they are untrue.²⁰⁴³ It seems, nonetheless that the case ignored the possibility that the agent may have apparent authority to fill in the proposal form, and stressed only that the agent does not have actual authority to do so.²⁰⁴⁴ Also, assuming that the agent is of the assured when filling the proposal form, there seems to be no reason why not to impute the agent's knowledge on the insurer when all answers are warranted.²⁰⁴⁵ Such an approach was subject to many criticisms by the LCCP2007.²⁰⁴⁶ For consumer insurance, the CIA2012 may have an impact on the reason related to agency i.e. in presuming when the agent is acting for the insurer or the assured; however, it does not affect the signature reason.²⁰⁴⁷

A potential problem as a result of the unclarity can arise when the assured pursues a claim in courts or in the FOS and gets a decision against the insurer, after the insurer has avoided the policy because of a negligent intermediary.²⁰⁴⁸ The assured then may be faced with the fact

²⁰⁴³ *Newsholme Brothers v Road Transport and General Insurance Co Ltd* [1929] 2 KB 356 [369]-[376] (Scrutton LJ).

²⁰⁴⁴ J. Birds, *Bird's Modern Insurance Law* (9th edn, sweet and Maxwell 2013) 218-220.

²⁰⁴⁵ *Ibid* ; However, for the reason of the signature, it seems to be correct.

²⁰⁴⁶ LCCP2007 prt 9.

²⁰⁴⁷ See below for the changes in the CIA2012 in regard to agents. It must be noted that removing the basis of the contract clause and converting the answers in the proposal form into warranties in the CIA2012, s 6 will not affect the *Newsholme* rule as it does not have an impact on a term which makes the proposal form as a part of an insurance contract which will follow ; See J. Birds, *Bird's Modern Insurance Law* (9th edn, Sweet and Maxwell 2013) 220.

²⁰⁴⁸ *Ibid* para 9.57.

that he must bring a new claim against the intermediary, since his older claim was directed to the wrong party.²⁰⁴⁹ This practice is believed to be detrimental to the insurance industry and to the consumers as well.²⁰⁵⁰

The FOS seems to follow the law in respect of the independent brokers, and treat them as agents for the assured.²⁰⁵¹ Regarding intermediaries selling products from one insurer, they are typically considered by the FOS to be agents of the insurer, but insurers never disclose the agency agreement between them and the intermediary.²⁰⁵² Generally speaking, the situation of tied agents who sell from one or several insurers is not yet clear.²⁰⁵³ Regarding completing proposal forms by the intermediary, the FOS decisions seem inconsistent.²⁰⁵⁴ In general, it seems that the FOS approach does not exactly follow the strict law and the *Newsholme* rule, and has developed its own approach, since it is free to apply what is “*fair and reasonable at all times*”.²⁰⁵⁵ However, it cannot be said that it is always on the assureds’ side, even though

²⁰⁴⁹ Ibid.

²⁰⁵⁰ Ibid.

²⁰⁵¹ LCCP2007 para 9.120.

²⁰⁵² Ibid paras 9.120–9.125.

²⁰⁵³ Ibid paras 9.52–9.54.

²⁰⁵⁴ LCCP2007 paras 9.126-136 ; In some cases where the intermediary filled the proposal form which contains errors and omissions and signed by the assured, the FOS decided against the insurer, ignoring the *Newsholme* rule. However, in other cases, the FOS decided against the assured and stated that the assured has signed the proposal form which is documentary evidence that the answers are true, confirmed that he read and understood the declarations which state that all information must be reviewed carefully before signing

²⁰⁵⁵ Ibid ; The FCA handbook, Dispute Resolution: Complaints (DISP) 3.6.1 .

assureds seem to recover better under its system.²⁰⁵⁶ What is needed, though, is a clarification of the position between the FOS practices and the courts practices, to be more consistent and to provide fairness.

The CIA2012 which applies now to consumer insurance²⁰⁵⁷ contains provisions to support determining the legal position of the intermediary, which affects consumer insurance according to the definition of the Act.²⁰⁵⁸ It numerates certain cases in which the agent would be considered an agent for the insurer in consumer cases.²⁰⁵⁹ In all other cases, the intermediary is presumed to be an agent for the consumer assured, unless the circumstances of the transaction suggest that the agent is of the insurer's.²⁰⁶⁰ The CIA2012 then numerates examples of factors which may suggest that the intermediary is the assured's (consumer's) agent, such as: paying a fee to the agent, the agent conducting a fair analysis of the market, or

²⁰⁵⁶ Ibid.

²⁰⁵⁷ The CIA2012 received the royal assent 8th of March 2012 and came into force on the 6th of April 2013 (Commencement order 2012, SI 2013/450).

²⁰⁵⁸ See CIA2012, s 1, s 9.

²⁰⁵⁹ CIA2012, sch 2, s 2, provides that,

“(a) when the agent does something in the agent’s capacity as the appointed representative of the insurer for the purposes of the Financial Services and Markets Act 2000 (see section 39 of that Act),

(b) when the agent collects information from the consumer, if the insurer had given the agent express authority to do so as the insurer’s agent,

(c) when the agent enters into the contract as the insurer’s agent, if the insurer had given the agent express authority to do so.”

²⁰⁶⁰ CIA2012, sch 2, s 3 (1) .

giving impartial advice to the consumer.²⁰⁶¹ Also, the Act numerates more factors which can indicate that the intermediary is the insurer's agent.²⁰⁶² It must be mentioned that the provisions are only for the goals of the Act, and therefore they will be confined to consumer insurance and in relation to the pre-contractual stage only.²⁰⁶³

In the author's view, there are some concerns that need to be addressed. Firstly, the independence of the broker to conduct fair analysis of the market may not represent the whole truth about the situation of the broker in question. The independence of brokers in respect of searching the market can be at stake, since brokers can be tempted to go for the highest commission insurer. Also, their search may only involve the highest commission bidders and exclude those insurers who pay smaller commissions, even though they can serve the assureds' needs perfectly. In other aspects, it must be remembered that most often brokers have agency appointment agreements with insurers which mean that they can perform other services for insurers as well.²⁰⁶⁴ Consequently, they can perform services for the insurer and

²⁰⁶¹ CIA2012, sch 2, s 3 (3).

²⁰⁶² CIA2012, sch 2, s 3(4) provides that,

“(a) the agent places insurance of the type in question with only one of the insurers who provide insurance of that type,

(b) the agent is under a contractual obligation which has the effect of restricting the number of insurers with whom the agent places insurance of the type in question,

(c) the insurer provides insurance of the type in question through only a small proportion of the agents who deal in that type of insurance,

(d) the insurer permits the agent to use the insurer's name in providing the agent's services,

(e) the insurance in question is marketed under the name of the agent,

(f) the insurer asks the agent to solicit the consumer's custom.”

²⁰⁶³ CIA2012, s 2-11 ; J. Birds , *Bird's Modern Insurance Law* (9th edn, Sweet and Maxwell 2013) 212.

²⁰⁶⁴ H. Beh & A. Willis, 'Insurance Intermediaries' (2009) 15 (2) Connecticut Insurance Law Journal 571, 576.

the assured in the same operation which can raise the question: can an assured really trust the independence of a broker and that he is really working for him, putting his interests as the main priority superseding his interests and those of the insurer?²⁰⁶⁵ Such concerns can threaten the measure of conducting fair analysis of the market as a factor indicating that the agent is of the assured.²⁰⁶⁶

Another issue to bear in mind is the complexity of the legal position of the insurance intermediaries. Many commentators noticed this complexity, as Sean Fitzpatrick observed:

*“[i]ndeed, one can hardly locate an in-depth legal analysis of the broker-agent distinction that does not feature words such as ‘blurry’ or ‘cloudy’.”*²⁰⁶⁷

Some classifications depend on independence and conducting a fair analysis of the market, as mentioned earlier.²⁰⁶⁸ However, others may depend on the modes of line sold, whether personal lines, e.g. insurer employees, or commercial lines, e.g. brokers. Another standard of

²⁰⁶⁵ It must be mentioned that a conflict of interest provision is embedded in the ICOBS 8 is only in relation to claims’ handling by the intermediary. However, a general conflict of interest provision which can apply to the insurance intermediary can be found in, The FCA Handbook, Senior Management Arrangements, Systems and Controls Sourcebook SYSC, SYSC 10.1.3 R which requires that reasonable measures must be taken to determine the conflict of interest which can occur during performing a service included in SYSC 10.1.1 R. Also, the SYSC10.1.7. R provides that any conflict of interest should be managed effectively to prevent any material harm or damage to the customer’s interests. However even these measures can reduce the problem, but still the assured may not be certain if such measures and management of conflict of interest were enough to prevent him from any harm or not.

²⁰⁶⁶ See above; CIA2012, sch 2, s 3 (3). *Winter v Irish Life Assurance plc* [1995] 2 Lloyd’s Rep 274.

²⁰⁶⁷ S. Fitzpatrick, ‘The Small Laws: Eliot Spitzer and the Way to Market Reform’ (2006) 74 (6) Fordham L Rev 3041, 3045.

²⁰⁶⁸ See above.

distinction relies on agency law principles, which is often not accurate.²⁰⁶⁹ Deciding whether the principle is the insurer or the assured depends on the actual tasks performed, and all intermediaries do services for both parties.²⁰⁷⁰

The attempts in classification can help to comprehend the intermediary's role; however, his exact legal position remains complex and indefinite. This complexity in comprehending the legal position in the industry itself stresses the fact that things must be more than clear for assureds especially consumers. Consumers are not aware of the meaning of the terms such as conducting fair analysis of the market, multi tied or single tied, and their consequences. Therefore, the author suggests that every intermediary must state from the outset to the assured whether he acts for the insurer, or if he acts for the assured, e.g. if he conducts a fair analysis of the market. In other words, he must state who he is an agent for, not just indicate the scope of his service as provided by the ICOBS 4.1.6.²⁰⁷¹ Also, the author suggests that the intermediary must also state to the assured the consequences of being an agent for him as an assured or being an agent for the insurer and explain them.

Given the importance of the classification of the intermediary and the scope of service he provides in determining who is he an agent for and the imputation of acts and errors, it would be helpful if such classification of the intermediaries depending on their scope of service is to be officially awarded by an official body, e.g. the FCA, to avoid any misconception and remove any discrepancies and doubts in classification.

The CIA2012 does not clarify the legal position, as was hoped from the point of view of the author. The Act tried to be decisive in section 2 by numerating the cases where the

²⁰⁶⁹ H. Beh & A. Willis, 'Insurance Intermediaries' (2009) 15 (2) Connecticut Insurance Law Journal 571, 578.

²⁰⁷⁰ Ibid.

²⁰⁷¹ See the next section for more.

intermediary will be the agent of the insurer, and by presuming that in all other cases, the agent will be the consumer's agent, which is a favourable approach.²⁰⁷² However, this decisiveness is blown away in section 3, where the door is left open for the intermediary to be the insurer's agent yet again if there are relevant circumstances, with numerated examples of those relevant factors or circumstances which may indicate that the intermediary is an agent of the insurer or the consumer assured.²⁰⁷³

From a consumer point of view, the CIA2012 will not be a certain way to know who the intermediary is an agent for, as the classifications are not decisive and clear and they are only examples. The consumer here will be left confused and uncertain as to whether the intermediary is working on his behalf or on behalf of the insurer. As the author stated before, consumers are not aware of complex legal indications and classifications, which further to being complex to comprehend by an ordinary consumer, are subject to the discretion of the court. Therefore, even if consumers thought they got the indication of the example right in determining who the intermediary is an agent for, courts could judge otherwise. An advantage which can be gained from the Act is that it can give the parties of the contract an indication of how things will be likely to be construed by courts, but it must be borne in mind that they are only examples, and it is not guaranteed that courts will stick to them considering the case as a whole. It can be argued that such discretion is favourable as courts can adapt the circumstances on each case in question. However, the author thinks that more protection must be offered to consumers, through clear standards which inform the consumer of the legal position of the intermediary before entering the contract and before the matter goes to court. Consumers have the right to know from the outset who are they dealing with, and must be able to know the consequences.

²⁰⁷² CIA2012, sch 2, s 2.

²⁰⁷³ CIA2012, sch 2, s 3.

6.2.2 The Duty Of Good Faith And Disclosure Of Intermediaries

At first, it must be noted that the duty of good faith is abolished for consumer insurance under the CIA2012.²⁰⁷⁴ For business insurance which is under the MIA1906, there is no indication of imposing a general duty of good faith on insurance intermediaries as it is on the assured or the insurer. The MIA1906 only provides that the insurance contract is a contract of good faith, and parties of the contract must observe utmost good faith in the contract, or it can be avoided by either of them.²⁰⁷⁵ It can be argued that a duty of good faith can be imposed on the intermediary indirectly, since he is an agent of the assured or the insurer as the case may be. However, the author's view is that the duty must be construed narrowly, since it is not usually imposed on other contracts, and accordingly the duty must be stated clearly, as is the case with the intermediaries' disclosure, as it will be shown below.

The ICOBS, however, contains numerous duties on insurers and insurance intermediaries reflecting good faith in treating customers as mentioned in chapter 5.²⁰⁷⁶ Besides the numerous disclosure duties,²⁰⁷⁷ the ICOBS requires the insurers and the insurance intermediaries to communicate with customers in a fair manner, with clarity, and without misleading them.²⁰⁷⁸ That will also apply to the communications regarding financial promotions, where reasonable steps must be taken to ensure their clarity and fairness, and where if such clarity and fairness become absent, the approval must be withdrawn with

²⁰⁷⁴ CIA2012, s 2.

²⁰⁷⁵ MIA1906, s 17.

²⁰⁷⁶ See Ch 5 under 5.2.

²⁰⁷⁷ See below under 5.3 for detailed disclosure duties.

²⁰⁷⁸ ICOBS 2.2.2.

notification.²⁰⁷⁹ Fairness was mentioned in the ICOBS as well regarding handling customers' claims, and managing the conflict of interest that may arise.²⁰⁸⁰

Nonetheless, despite these fairness obligations on the insurers and the insurance intermediaries in the ICOBS, it is difficult to say that they are identical to the general duty of good faith embedded in section 17 of the MIA1906. The reason is that such fairness obligations are owed by the insurance intermediaries and the insurers, to the customers or assureds, whereas the duty of good faith under section 17 of the MIA1906 is owed by the insurer and the assured to each other. Also, the fairness requirements towards the assured in the ICOBS are not general and only relate to certain instances, e.g. communication, claims handling, and managing the conflict of interest.

As far as insurance intermediaries are concerned, the ICOBS can impose in this sense a limited fairness requirement, but only towards the assured, and not towards the insurer which supports the argument of the absence of a general duty of good faith on the insurance intermediaries.

In respect of disclosure, there is a clear duty of disclosure on the intermediary under the MIA1906 and the ICOBS. Such duty will be explained as follows considering the suggested reforms for business insurance:

I Disclosure Of Intermediaries Under The MIA1906 (Business Insurance Contracts):

It must be noted that the MIA1906 now applies to business insurance contracts only, as the CIA2012 applies to consumer insurance.²⁰⁸¹ Therefore the discussion in this section will

²⁰⁷⁹ ICOBS 2.2.3; This will apply to pricing claims as well, see ICOBS 2.2.4.

²⁰⁸⁰ ICOBS 8.1.1 ; ICOBS 2.3.

concern business insurance as it is in the MIA1906. Before proceeding with the MIA1906, it must be mentioned that the duty of disclosure on consumer assureds is abolished by the CIA2012,²⁰⁸² and any rule of law and specifically what is embedded in section 18, and 19 of the MIA1906 as regards the disclosure of the assured and the agent is removed.²⁰⁸³ The CIA2012 provides a new subsection (2) added to section 19 of the MIA1906, which states that: *“This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.”*²⁰⁸⁴

Now for the MIA1906, the duty of disclosure imposed on brokers can be found in section 19 of the MIA1906 where the agent must disclose:

“(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.”

²⁰⁸¹ The CIA2012 received the royal assent 8th of March 2012 and came into force on the 6th of April 2013 (Commencement order 2012, SI 2013/450) CIA2012, s 11.

²⁰⁸² CIA2012, s 2, s 11(1)(a).

²⁰⁸³ CIA2012, s 11(1)(b).

²⁰⁸⁴ CIA2012, s 11(2)(b).

It must be noted that the application of section 19 of the MIA1906 covers marine and non-marine insurance cases.²⁰⁸⁵ Also section 18 on the facts which need not be disclosed is applied on the agent as well.²⁰⁸⁶

The duty of disclosure in section 19 (b) is logical, since the agent represents the assured and must disclose all the material facts that must be disclosed by the assured; however, it does not really add to the assured's disclosure required in section 18.²⁰⁸⁷ Nonetheless, section 19(a), where an independent duty of disclosure is required from the broker, is the most problematic.²⁰⁸⁸ First of all, it must be clarified that the broker who owes the duty of disclosure in section 19(a) of the MIA1906 is only the "agent to insure" or the placing broker.²⁰⁸⁹ That means that other brokers in the chain, including the producing brokers, are not responsible for such a duty, and the question will be : is the information which is known to the assured's agent known to the assured or not, because of their relationship?²⁰⁹⁰ According to section 19(a) of the MIA1906, the 'agent to insure' should disclose any material

²⁰⁸⁵ *PCW Syndicates v PCW Reinsurers* [1996] 1 WLR 1136.

²⁰⁸⁶ MIA1906, s 18 ; As the case with the assured.

²⁰⁸⁷ See LCCP2007 para 9.77; LCCP2012 para 7.15(1).

²⁰⁸⁸ LCCP2007 para 9.78 ; LCCP2012 para 7.15(2).

²⁰⁸⁹ *Blackburn Low & Co v Haslam* (1888) LR 21 QBD 144 ; *Blackburn Low & Co v Vigors* (1887) LR 12 App Cas 531 ; However, the exact meaning of the agent to insure is not really certain (*PCW Syndicates v PCW Reinsurers* [1996] 1 WLR 1136 ; *Group Josi Re v Walbrook Insurance Co Ltd* [1996] 1 All ER 791) ; Compare with *GMA v Unistorebrand International Insurance AS* [1995] LRLR 333 (Rix J) where an intermediate broker's disclosure was considered ; See also *ERC Frankona Reinsurance v American National Insurance Co* [2005] EWHC 1381 (Comm) , [2006] Lloyd's Rep IR 157 (Andrew Smith J) .

²⁰⁹⁰ R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-041.

information known to him or ought to have known to him in the ordinary course of business, separately from the assured's knowledge or lack of knowledge.²⁰⁹¹

The literal wording of section 19 (a) does not put any limitation on the scope of the duty except that the information disclosed should be material. However, it is not clear from the wording of the section if disclosure is limited to the capacity of the broker as an agent to the assured or it can include disclosure of information known to the broker for reasons not connected to his capacity as a broker, or in his capacity as a broker to other assureds but not to the assured in question.²⁰⁹² The case law is unclear as regards these issues,²⁰⁹³ but it can be said that there is some authority for the suggestion that the scope of section 19(a) is not conclusive and subject to an interpretation pertaining to the broker's capacity in having the information, where the section will apply only if the broker has material information in his

²⁰⁹¹ MIA1906, s19 ; *Blackburn Low & Co v Vigors* (1887) 12 App Cas 531 ; *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep IR 191, [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483, [2003] UKHL 6, [2003] Lloyd's Rep IR 230 (The House of Lords decided that the duty of disclosure on the broker has an independent nature from the duty of disclosure on the assured, and that both duties are required.).

²⁰⁹² R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-042.

²⁰⁹³ *PCW Syndicates v PCW Reinsurers* [1996] 1 WLR 1136 (Staughton LJ) (where it was suggested that information not gained by the broker in his capacity as an agent to insure is not required and that no authorities suggest otherwise regard the interpretation of section 19(a) of the MIA1906) ; Compare with *El Ajou v Dollar Land Holdings Plc* [1994] 3 All ER 685 (Hoffmann LJ) (where it was viewed that the only limit on the information is materiality, and that the broker is bound to disclose information known to him even not in his capacity as an agent for the assured); The leading case is *Société Anonyme d'Intermediaires Luxembourgeois v Farex Gie* [1995] LRLR 116 , where Hoffmann LJ applied his view in the former case and stated that the assured's agent is bound to disclose any material information known to him regardless of the way of that knowledge, and in any capacity. Saville LJ commented that the agent's duty of disclosure is not limited to the knowledge he has from the assured, as it goes further to cover knowledge which is possessed otherwise.

capacity as an agent to the assured; however, the scope of such interpretation is unclear, even if we assume it exists.²⁰⁹⁴

For the consequences of breaching the broker's duty of disclosure in section 19 of the MIA1906, the remedy for the insurer will be the avoidance of the policy.²⁰⁹⁵ Hence, even though section 19 of the MIA1906 places a duty on the broker in disclosure, there is no remedy for the insurer against the broker for the breach of the duty, as the remedy is only against the assured which is the avoidance of the policy.²⁰⁹⁶

However, the breach of the broker's independent duty may in theory give the right for damages if the insurer is precluded from his right to avoid, e.g. because of an agreement, and therefore experienced loss because of the broker's breach.²⁰⁹⁷ The different scenarios for the broker's non-disclosure or misrepresentation are considered in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank*.²⁰⁹⁸

²⁰⁹⁴ Ibid; R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-042.

²⁰⁹⁵ Just like the assured as the duty of the broker's disclosure stems from the assured's duty of disclosure; MIA1906, s 17-18; *HIH Casualty and General Insurance Co Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] Lloyd's Rep IR 230.

²⁰⁹⁶ Ibid.

²⁰⁹⁷ *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep IR 191, [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483, [2003] UKHL 6, [2003] Lloyd's Rep IR 230.

²⁰⁹⁸ [2001] Lloyd's Rep IR 191, [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483, [2003] UKHL 6, [2003] Lloyd's Rep IR 230 ; Against the assured: Damages cannot be awarded for breaching the duty of good faith by the broker. Nonetheless, damages can be awarded based on other justifications: assured's 'vicarious' liability, the tort of deceit if the broker is fraudulent, under section 2(1) of the Misrepresentation Act 1967 if there is a misrepresentation by the broker, for contracts for insurance (declaration policies) where there is no duty of good

In general, the principle who becomes liable for his agent's unauthorised acts can have a remedy in damages against his agent as their relationship carries fiduciary duties.²⁰⁹⁹

In practice, assureds mostly are the ones who seek remedy from their agents,²¹⁰⁰ and the agent can be liable to the assured based on different grounds, such as for breaching his fiduciary duties,²¹⁰¹ duty of care,²¹⁰² and duty of disclosure of material information.²¹⁰³

faith required, there can be damages : in deceit, under section 2(1) of the Misrepresentation Act 1967, and for breaching the assured's duty of care because of the broker's misrepresentation.

Against the broker: damages cannot be awarded for breaching the duty of good faith by the broker since the duty of disclosure on the broker stems from the assured's duty and there is no right for damages for the assured's breach. If the insurer did not avoid the contract, there is no implied right of damages instead. Putting good faith aside, there is no duty on the broker to speak, as there cannot be a tortious duty of care running at the same time with the duty of good faith, and the agent does not owe a duty of care to third parties, as he owes it only to the principle. If the broker was fraudulent, damages can be awarded for the tort of deceit, but not regarding the broker's negligent misrepresentation according to section 2(1) of the Misrepresentation Act 1967 since it has a limited application to the parties of the contract.

The right of damages which is based on the vicarious liability of the assured for the fraud of the broker can be generally barred by express terms in a direct manner or by the way of authority withdrawal . However, there cannot be a bar on the assured's fraudulent misrepresentation based on public policy reasons, and a bar on the broker's fraud cannot operate if the assured is involved in the fraud, or if it plays a role in a fraudulent arrangement.

²⁰⁹⁹ For example, if the insurer is precluded from his right to avoid for non-disclosure because of the imputation of the agent's knowledge of material facts to him. This insurer can have a remedy against his agent in damages, See *Woolcott v Excess Insurance Co Ltd* [1979] 1 Lloyd's Rep 633, [1979] 1 Lloyd's Rep 23, [1979] 2 Lloyd's Rep 210.

²¹⁰⁰ See above under 6.2.1 as brokers are known mostly as the assured's agents ; J. Birds, *Bird's Modern Insurance Law* (9th edn, Sweet and Maxwell 2013) 222.

²¹⁰¹ See for example, *Anglo-African Merchant v Bayley* [1970] 1 QB 311.

For the latter duty, it must be noted that since in practice, when the broker is involved, the communication with the assured will be direct with him and not the insurer, and generally his knowledge will be imputed to the assured, therefore his duty in advising the assured about those material matters will be crucial.²¹⁰⁴ When the broker does not ask questions about material facts which he knows are material, he can be liable in damages to the assured, when the insurer avoids the contract.²¹⁰⁵ Also, the same result can apply when the broker does not disclose material facts known to him to the insurer.²¹⁰⁶ The traditional view in common law²¹⁰⁷ that the broker does not have to warn the assured about his duty of disclosure has changed in recent cases with the regulatory rules and the requirements of the ICOBS,²¹⁰⁸ where the broker's duties were summarised by David Steel J in *Jones v Environcom Ltd*.²¹⁰⁹ He stated that the broker is required to inform the assured of his disclosure duty of material facts, explain the consequences of breach, advise on the information which must be disclosed,

²¹⁰² The cause of action in damages for the assured can be contractual or in tort, see for example: *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, *Osman v J Ralph Moss Ltd* [1970] 1 Lloyd's Rep 313.

²¹⁰³ See below.

²¹⁰⁴ See above under 6.2.1.; J. Birds, *Bird's Modern Insurance Law* (9th edn, Sweet and Maxwell 2013) 226.

²¹⁰⁵ *McNealy v Pennine Insurance Co Ltd* [1978] 2 Lloyd's Rep 18.

²¹⁰⁶ *Woolcott v Excess Insurance Co Ltd* [1979] 1 Lloyd's Rep 633, [1979] 1 Lloyd's Rep 23, [1979] 2 Lloyd's Rep 210.

²¹⁰⁷ See for example, *Warren v Sutton* [1976] 2 Lloyd's Rep 276; *O'Connor v DBD Kirby & Co* [1972] 1 QB 90.

²¹⁰⁸ See above under 6.2.1; see ICOBS 5.1.4; See below for more on ICOBS.

²¹⁰⁹ [2010] EWHC 759 (Comm), [2010] Lloyd's Rep IR 676; See also *Synergy Health (UK) Ltd v CGU Insurance Plc* [2010] EWHC 2583 (Comm), [2011] Lloyd's Rep IR 500.

i.e. material information, and provide reasonable care for matters which must be disclosed, but the assured may not appreciate their importance and believe there is no need to state them.²¹¹⁰

As the broker has various disclosure and advice duties to the assured under the ICOBS,²¹¹¹ the assured can claim damages under section 150 of the FSMA2000, which is now replaced by section 138D of the Financial Services Act 2012,²¹¹² when the broker breaches those statutory duties provided it satisfied the conditions.²¹¹³

²¹¹⁰ *Jones v Environcom Ltd* [2010] EWHC 759 (Comm), [2010] Lloyd's Rep IR 676 [53] (David Steel J).

²¹¹¹ for example : ICOBS 4.3.1, 4.3.2, 5.1.4, 5.3, 6.1; see below for more detailed consideration on the FSMA2000.

²¹¹² Financial Services Act 2012, sch18 , prt 1, s 12.

²¹¹³ The claimant must be a "*private person*" who suffered loss because of the authorised firm's breach. A private person is defined by the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, reg 3 as:

(a) any individual, unless he suffers the loss in question in the course of carrying on—

(i) any regulated activity; or

(ii) any activity which would be a regulated activity apart from any exclusion made by article 72 of the Regulated Activities Order (overseas persons); and

(b) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind;

but does not include a government, a local authority (in the United Kingdom or elsewhere) or an international organisation.

II The Disclosure of Intermediaries under the LCCP2012 (Business Insurance Contracts: Suggested Reforms):

This independent duty of disclosure on the broker has been subject to much criticism and debate.²¹¹⁴ For business insurance, the LCCP2012 suggests some amendments on the duty of disclosure required from the intermediaries.²¹¹⁵ Specifically, the LCCP2012 proposes to widen the application of disclosure to include all kinds of brokers in the chain, not just the placing broker.²¹¹⁶ However, it limits the ambit of information disclosed by those brokers to include only information which is withheld or communicated to them in their capacity as brokers for that particular business assured, and information which the brokers avoided obtaining.²¹¹⁷ That implies that any information known or received by those brokers in a different capacity, for example as agents for other assureds, need not be disclosed.²¹¹⁸ In addition, the LCCP2012 suggests incurring liability on the business assured, where the insurer will be entitled to a remedy if the broker was involved in making reasonable enquiries on the business assured's behalf, but did not disclose information which can be discovered by

(2) For the purposes of paragraph (1)(a), an individual who suffers loss in the course of effecting or carrying out contracts of insurance (within the meaning of article 10 of the Regulated Activities Order) written at Lloyd's is not to be taken to suffer loss in the course of carrying on a regulated activity."

²¹¹⁴ See for example LCCP2007 ; LCCP2012.

²¹¹⁵ LCCP2012 paras 7.1–7.78.

²¹¹⁶ LCCP2012 paras 7.54–7.65.

²¹¹⁷ Ibid.

²¹¹⁸ Ibid.

reasonable enquiries suiting the insurance operation in question in terms of size, complexity and kind.²¹¹⁹ That is compatible with the LCCP2012's former suggestions of incurring liability on the business assured himself if no broker was involved for such type of information.²¹²⁰ The final suggestion by the LCCP2012 is to remove section 19 (b) of the MIA1906.²¹²¹ The reason is that it seems unnecessary and carries no real added obligation on the assured.²¹²²

In the draft clauses of the Insurance Contract Law Draft Bill issued recently,²¹²³ section 19 of the MIA1906 was repealed as the draft Bill deals with the agent's knowledge in other provisions.²¹²⁴ The draft Bill aims to consider the agent's knowledge and the information it withholds when acting on behalf of that particular proposer, and that will be applicable to all

²¹¹⁹ Ibid.

²¹²⁰ See part 6 in the LCCP2012.

²¹²¹ LCCP2012 paras 7.66–7.69; The section states that the broker is bound to disclose: *“Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.”*

²¹²² Ibid.

²¹²³ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

²¹²⁴ See below.

the chain of brokers and not only the placing broker.²¹²⁵ Therefore, the knowledge of the agent under the draft Bill can be imputed to the non-consumer proposer in the following methods:

- a. The agent can be included within the individuals who are under the responsibility to conduct insurance for the non-consumer proposer under section 5(2),(3) of the Insurance Contract Law Draft Bill, as the definition of those individuals include those who conduct insurance on behalf of the non-consumer proposer in any capacity, e.g. agents, brokers.²¹²⁶ Therefore the definition catches any classification or capacity to those who conduct insurance, e.g. agent, brokers, and regardless of their position in the chain, e.g. producing brokers, placing brokers.
- b. The agent's knowledge can be included within the duty of the non-consumer proposer to conduct reasonable search of information since he ought to know it under section 5(4) of the Insurance Contract Law Draft Bill. The reasonable information search can include the agent's knowledge provided it is available the non-consumer proposer, which will rule out the information withheld by the agent in the course of acting on behalf of other proposers.²¹²⁷

²¹²⁵ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 2.51.

²¹²⁶ Insurance Contract Law Draft Bill, cl 5(5)(b).

²¹²⁷ Ibid, cl 5(4); The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 2.52.

It must be noted that the agent does not hold a duty to the insurer under the draft Bill, as the non-consumer proposer will be the only person owing a duty to the insurer to make a fair presentation of the risk.²¹²⁸ The agent, on the other hand will have a professional duty of care as regards the proposer which precludes him from causing the proposer to be in breach of its duty to make a fair presentation of the risk.²¹²⁹

III Disclosure Of Intermediaries Under The FSMA2000²¹³⁰

In respect of disclosure requirements, the FSMA2000 numerated certain issues which must be disclosed by the intermediary to the customer. Issues which must be disclosed include the scope of the service they provide, and any fees or commissions they collect, in addition to general disclosure requirements.²¹³¹ The general disclosure requirements can be found under ICOBS 4.1, where the intermediary must disclose minimum information which is believed to give the customer a clear idea about who is he dealing with, and promote trust in the intermediary and the insurance industry before concluding the contract or on amendments or renewal.²¹³²

²¹²⁸ Insurance Contract Law Draft Bill, cls 3,4; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 2.53.

²¹²⁹ Ibid ; For contracting out of these rules see Ch 5 under 5.10.

²¹³⁰ This section must be read in conjunction with Ch 5 under 5.3 where other disclosure requirements are mentioned.

²¹³¹ See below.

²¹³² ICOBS 4.1.2 provides that : *Prior to the conclusion of an initial contract of insurance and, if necessary, on its amendment or renewal, a firm must provide the customer with at least:*
(1) *its name and address;*

Another type of disclosure which is required also before concluding the contract, or on amendments or renewal, is of the scope of mediation service that the intermediary provides, whether it is based on fair market analysis, tied to one or more insurers, or none of those. If the advice is not based on fair market analysis, the intermediary must inform the customers of their right to request the name of those insurers who are tied, or may be tied, with him.²¹³³

This disclosure of the intermediary's scope of service is welcomed, since it helps the process of the imputation of the acts, errors or omissions of the intermediary on the assured or the insurer. Nonetheless, the question is: does this disclosure serve the customer? In other words,

-
- (2) the fact that it is included in the Financial Services Register and the means for verifying this;*
 - (3) whether it has a direct or indirect holding representing more than 10% of the voting rights or capital in a given insurance undertaking (that is not a pure reinsurer);*
 - (4) whether a given insurance undertaking (that is not a pure reinsurer) or its parent undertaking has a direct or indirect holding representing more than 10% of the voting rights or capital in the firm; and*
 - (5) the procedures allowing customers and other interested parties to register complaints about the firm with the firm and the Financial Ombudsman Service or, if the Financial Ombudsman Service does not apply, information about the out-of-court complaint and redress procedures available for the settlement of disputes between the firm and its customers.*

²¹³³ ICOBS 4.1.6. provides,

- "(1) Prior to the conclusion of an initial contract of insurance (other than a connected travel insurance contract)² and, if necessary, on its amendment or renewal, a firm must tell the customer whether:*
 - a) it gives advice on the basis of a fair analysis of the market; or*
 - (b) it is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings; or*
 - (c) it is not under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings and does not give advice on the basis of a fair analysis of the market.*
- (2) A firm that does not advise on the basis of a fair analysis of the market must inform its customer that he has the right to request the name of each insurance undertaking with which the firm may and does conduct business. A firm must comply with such a request. "*

does it help the customer realise that he will be, for example, responsible for the intermediary's acts? ²¹³⁴ It must be borne in mind that the ICOBS does not require the intermediary to disclose who is he an agent for, which means that the assured is expected to know the results of that disclosure of the scope of service, i.e. that the intermediary is the agent of a certain party in the contract.²¹³⁵

The author's view is that such disclosure of the scope of service is meaningless without a combined obligation of explaining its results. The customer, especially the consumer, will have no idea what are the significant results of the agent's scope of service on the imputation of knowledge, acts or omissions. Even in the ICOBS itself, the line is blurred when it comes to the tied agents, especially without an official body determining the agent's scope of service. Therefore, it is extremely unfair to lay the burden on the assured to know the results of the agent's scope of service. Even if the results are explained, the burden of matching the service type to the result will still be on the assured, which can cause complications and misconceptions. Accordingly, the author suggests that the intermediary discloses in a direct manner who is he agent for, to avoid any misconceptions and to clarify the results of the scope of services he provides to the assured.²¹³⁶

To ensure full transparency with the customer, the ICOBS required full disclosure by the intermediary of fees that do not include premiums and which are taken for the reason of mediation activities before the conclusion of the insurance contract or before liability is

²¹³⁴ See also ICOBS 5.3.3 for the meaning of fair analysis of the market as the intermediary "*must give that advice on the basis of an analysis of a sufficiently large number of contracts of insurance available on the market to enable it to make a recommendation, in accordance with professional criteria, regarding which contract of insurance would be adequate to meet the customer's needs.*"

²¹³⁵ See above for discussion on that the CIA2012 did not provide a clear solution for this.

²¹³⁶ See also above under 6.2.1 in regards the suggestions for the CIA2012.

incurred, and that disclosure will also include any fees which can incur during the policy.²¹³⁷ As for commissions, the intermediary is not required to disclose them directly and for all kinds of assureds; he is only required to do so upon the customer's request, if it is a commercial customer.²¹³⁸ That means that consumers cannot request the intermediary to disclose such commissions. This is interesting, as commercial customers can pressure the intermediary to disclose such commissions since they are in a more powerful position, as a business, to negotiate the particularities of the contract, especially large businesses. On the other hand, consumers cannot perform such negotiations with the intermediary, since their position is not commanding enough to pressure the broker to disclose his commissions. Therefore, the author suggests that such disclosure of commission must be for all kinds of assureds, and especially consumers.²¹³⁹ The author does not consider that there should be differences in disclosure requirements depending on the type of the assured; as discussed in chapter 5, if the law is unjust it must be altered for all kinds of assureds.

Also, the ICOBS provides a general provision regarding the commercial customers which extends the disclosure to any remuneration from any arrangement, e.g. payments relating to volume of sales and not only confined to commission.²¹⁴⁰ The commission disclosure requirements apply even if the intermediary is not considered an agent for the business customer, as they come on top of the fiduciary duty.²¹⁴¹

²¹³⁷ ICOBS 4.3.1. , 4.3.2.

²¹³⁸ ICOBS 4.4.1.

²¹³⁹ See below under 6.3.2. for comparison of the matter in Saudi insurance laws.

²¹⁴⁰ ICOBS 4.4.2.

²¹⁴¹ ICOBS 4.4.3.

Also, as mentioned in chapter 5, the intermediary must ensure that the commercial customer knows what type of information must be disclosed, and that can be by explaining the disclosure duty of material information, and the consequences of failing to disclose, as well as by asking clear questions of material information to the insurance.²¹⁴² For consumers, the intermediary has to explain the duty to take reasonable care not to misrepresent and the results of being negligent, deliberate or reckless in making a misrepresentation.²¹⁴³ Also he has to ask clear and unambiguous questions to customers on the matters relevant to the insurance contract or the variation.²¹⁴⁴ Another significant point is the conflict of interest that the intermediary can have by being an agent for the assured but paid by the insurer, partly by the premiums paid by the customer, and partly by fees, or another type of commission, such as contingent commissions.²¹⁴⁵ This matter is very important, but the ICOBS mentioned it only in the realm of claims handling.²¹⁴⁶ However, a general conflict of interest provision which can apply to the insurance intermediary in this case can be found in the Senior Management Arrangements, Systems and Controls Sourcebook (SYSC),²¹⁴⁷ which require that reasonable measures must be taken to determine the conflict of interest which can occur during performing a service.²¹⁴⁸ Also, any conflict of interests should be managed effectively

²¹⁴² ICOBS 5.1.4.

²¹⁴³ Ibid.

²¹⁴⁴ Ibid.

²¹⁴⁵ See also above under 6.2.1.

²¹⁴⁶ ICOBS 8.3.3.

²¹⁴⁷ The FCA Handbook, Senior Management Arrangements, Systems and Controls Sourcebook (SYSC).

²¹⁴⁸ SYSC 10.1.3 R; the service must be included within SYSC 10.1.1 R.

to prevent any material harm or damage to the customer's interests.²¹⁴⁹ However, even these measures can reduce the problem, but still the assured may not be certain if such measures and management of conflict of interest are enough to prevent him from any harm or not.

It must be mentioned that the assured can claim damages under section 150 of the FSMA2000, which is now replaced by section 138D of the Financial Services Act 2012²¹⁵⁰ when the broker breaches those statutory duties and the assured suffers a loss, provided it satisfies the conditions.²¹⁵¹

²¹⁴⁹ SYSC 10.1.7 R.

²¹⁵⁰ Financial Services Act 2012, sch18, prt 1, s 12.

²¹⁵¹ The claimant must be a "*private person*" who suffered loss because of the authorised person's breach. A private person is defined by the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001, reg 3.

6.3 INSURANCE INTERMEDIARIES DUTY OF GOOD FAITH, DISCLOSURE, AND HONEST REPRESENTATION IN SAUDI INSURANCE LAWS

6.3.1 The Legal Position Of Insurance Intermediaries In Saudi Insurance Laws

Before the promulgation of the LSCIC2003 in Saudi Arabia, insurance mediation was practised in a chaotic manner, with no specific rules or supervision.²¹⁵² Even the CCL1931 did not mention anything about insurance mediators in its section on insurance. The market was full of insurance professionals, such as brokers, agents, and advisors, but their degree of professionalism varied considerably and caused confusion for their customers. In fact, many of these professionals tagged themselves with professional names just to create a false image to customers, exploiting the lack of an official authority to supervise their activities. The real capacity of those bodies to perform what they tagged themselves to be may have been known to their competitors, but was not known in any way to their customers.

The legal and professional position of the insurance intermediaries has improved dramatically, since it has been clarified to a great extent with the promulgation of the LSCIC2003 and the IMCOCR2008. However, the most welcomed support in terms of clarification is the wholly dedicated regulation, i.e. the Regulation for Insurance Intermediaries ‘RII2011’, which was issued on 12 October 2011.²¹⁵³ Hence, discussion will

²¹⁵² See Ch 3.

²¹⁵³ See <http://www.sama.gov.sa/sites/samaen/Insurance/InssuranceLib/PC_ISD_Intermediaries_Regulation_E.pdf> accessed 16 October 2011.

be confined to the RII2011, as the most comprehensive code dedicated to regulate insurance mediation.²¹⁵⁴

In contrast with English insurance laws, Saudi insurance laws have provided clear distinction between the types of mediation activities and the related agency consequences.

First of all, it is important to note that the term ‘intermediary’ under the RII2011 includes insurance agents and insurance/reinsurance brokers.²¹⁵⁵ Hence, other professionals, such as loss adjusters or claim handlers, are not considered intermediaries and are therefore excluded from the ambit of the regulation.²¹⁵⁶ This is similar to a certain extent with the IMD in excluding such professions from the insurance mediation activities.²¹⁵⁷

Under the RII2011, the intermediary must be a juristic entity, and not a natural person.²¹⁵⁸ An insurance agent under the RII2011 is defined as a,

*“Juristic entity that for compensation represents the insurance company to solicit, procure and negotiate insurance contracts.”*²¹⁵⁹

An insurance broker is defined as follows:

²¹⁵⁴ Even though LSCIC2003 and the IMCOCR2008 contain articles that regulate insurance intermediaries, the RII2011 is considered more detailed as it contains those issues covered by the LSCIC2003 and the IMCOCR2008 and more. Hence, the author confined the discussion to the RII2011 only.

²¹⁵⁵ Prt1, Art 4 RII2011.

²¹⁵⁶ Ibid.

²¹⁵⁷ IMD [2003] OJ L9/3, Art 2(3).

²¹⁵⁸ Prt 1, Art 4 RII2011.

²¹⁵⁹ Ibid.

*“[A] juristic entity that for compensation negotiates with the insurance company in order to conduct insurance services for policyholders.”*²¹⁶⁰

Based on the above, it is obvious that under the RII2011 agents and brokers stand for different meanings. Those who are tagged as ‘insurance agents’ are considered the insurer’s agent, and they include those who represent the insurer for conducting the insurance contract. On the other hand, those who are tagged as ‘insurance brokers’ are considered the assureds’ agents and they conduct insurance services for the assureds with the insurer. The insurance ‘agent’ who is considered the insurer’s agent, under the RII2011, does not have the right to represent more than one insurer, unless it has a prior approval from SAMA.²¹⁶¹ Hence, it can be stated that the term ‘insurance agent’ under the RII2011 includes single-tied and multi-tied agents where they will be both considered the insurer’s agent. In any case, the intermediary must ensure that he explains to the insured the nature of the service provided and the relationship between the parties.²¹⁶² It must be noted that the IMCOCR2008 as mentioned in chapter 5 confirms that the company must inform the assured of its legal nature and relationship with him: whether it is an insurer itself, or acting on behalf of the insurer, or acting on behalf of the assured.²¹⁶³ Therefore, the insurance intermediary is required to disclose clearly who he is agent for: whether he is an agent of the assured or the insurer. This position is more decisive and favourable than the ICOBS which only requires the intermediary to disclose the scope of service he provides, e.g. if he was conducting a fair

²¹⁶⁰ Ibid.

²¹⁶¹ Part 4, Art 31(c) RII2011.

²¹⁶² Part 2, Art 8 RII2011.

²¹⁶³ Art 30 IMCOCR2008.

analysis of the market, but is not required in a direct manner to disclose who he is agent for.²¹⁶⁴

The significance of the legal position of the intermediary in terms of who he represents lies in the imputation of his acts, e.g. misrepresentations and non-disclosure, or knowledge to the right party in the insurance contract, whether it is the insurer or the assured, and its related consequences. Nonetheless, the type of broker or agent liable, whether the placing or producing broker, is not as clear compared to English insurance laws, where it is established that liability lies on the placing broker alone within the chain of brokers.²¹⁶⁵

It is interesting to note that in the realm of the intermediaries' obligations towards the assureds; one obligation includes refraining from influencing or pressuring assureds, and reminding them that all the answers and statements are their responsibility as assureds.²¹⁶⁶ Such an obligation can raise serious questions about the liability of those intermediaries for any misrepresentation, non-disclosure, error, omission, or advice they can give the assureds. If the obligation were interpreted strictly, that may mean that no responsibility whatsoever can be imputed on the intermediary in the insurance transaction, which is rather an extreme result. The author's opinion is that such an obligation does not deprive the intermediary from all his liabilities under the agency law principles, and that burdening assureds with the sole responsibility of the answers and statements is limited to the answers documented in the proposal form. In other words, the intermediary will not be liable for any misrepresentation or non-disclosure in respect of completing the proposal form only, and not to other aspects of the insurance transaction. This result is supported by the subsequent subsection of the article,

²¹⁶⁴ See above under 6.2.1; ICOBS 4.1.6.

²¹⁶⁵ See above under 6.2.2.

²¹⁶⁶ Part 6, Section B, Art 44(b) RII2011.

which lays an obligation on the intermediary to remind the assureds to check their answers carefully in the documents.²¹⁶⁷

Hence, the position of the intermediary in Saudi insurance laws, whether he is an agent for the assured or the insurer when completing the proposal form, seems to be strict and adopts that all the answers and statements in the proposal form are the responsibility of the assureds. English insurance laws seem to share the same strict result regarding completing the proposal forms as their liability will be on the assured.²¹⁶⁸

6.3.2 The Duty Of Good Faith And Disclosure Of Insurance Intermediaries Under Saudi Insurance Laws

Saudi insurance laws provide a general duty of good faith on the intermediaries in their conduct of insurance transactions. Part 2, Art 8 of the RII2011 provides that,

“Intermediaries shall comply with the rules of professional conduct by fulfilling the following requirements:

a) Act in an honest, transparent and fair manner, and fulfil all of their obligations towards clients, as stipulated by Saudi Arabian laws and regulations. Where these obligations have not been fully codified, companies should abide by internationally accepted best practices.”

This general duty of honesty or good faith is a positive step, since it can catch any incidents of bad faith which are not mentioned separately. Also, it implies avoiding misrepresentation and non-disclosure by the insurance intermediaries. Such a general requirement is not

²¹⁶⁷ Part 6, Section B, Art 44(C) RII2011.

²¹⁶⁸ See above under 6.2.1.

shocking, considering that general contract law in Saudi Arabia relies on good faith and views it as a priority as part of the obedience to the precepts of Islam.²¹⁶⁹ Moreover, such a duty follows the general trend in Saudi insurance laws which tend to the more insured-friendly, and it is logical considering that such duty is also required from the insurer and the insurance intermediaries in the IMCOCR2008, and from the assured and the insurer in the practice of the IVDRC.²¹⁷⁰

Regarding disclosure,²¹⁷¹ the RII2011 in the realm of information furnishing, creates an obligation on insurance intermediaries, to request their customers to provide a full and fair disclosure of all material information they know, and to explain to them the consequences of non-disclosure or any inaccuracy.²¹⁷² Also, the RII2011 in the realm of sales practices provides that intermediaries must explain to the clients about the importance of providing disclosure of material information to the coverage. Explaining to the clients their obligation to disclose and its importance is not confined to pre-contractual information, but also includes any subsequent changes after the commencement of the contract which can affect the insurance cover during the policy, as the intermediaries must explain to the clients the importance of such disclosure.²¹⁷³ Such obligations on the intermediaries are similar to those required from insurers and intermediaries in the IMCOCR2008, which was argued in this thesis to be a favourable approach.²¹⁷⁴ However, in the RII2011 the obligation on the

²¹⁶⁹ See Ch 3.

²¹⁷⁰ Ibid ; Art 11, IMCOCR2008.

²¹⁷¹ See other disclosure requirements on the intermediary in the IMCOCR2008 in Ch 5 under 5.3.

²¹⁷² Section B, Art 43(f), Art 44(a) RII2011.

²¹⁷³ Section B, Art 44(d) RII2011.

²¹⁷⁴ See Ch 5 under 5.3.1 ; See Art 32, 42 IMCOCR2008.

intermediary is not just to inform the clients of their duty of disclosure, like that which is required in the IMCOCR2008,²¹⁷⁵ but to explain further the duty and its importance and explain the consequence of breach, which reflects more protection to the client.²¹⁷⁶ The author supports such approach, and argued earlier in favour of including an explanation requirement in the IMCOCR2008.²¹⁷⁷ Those requirements are similar to those under English insurance law.²¹⁷⁸

Moreover, renewal notices must be checked by the intermediaries to ensure including a reminder to clients about disclosing any material changes which can affect their cover, from the start of cover or from the last renewal date.²¹⁷⁹

The RII2011 places a general obligation on the insurance intermediaries to reveal to the insurer any information or documents which relates to the customers, and which may affect the insurer's offer of coverage, or affect the conditions or the price of the policy.²¹⁸⁰ Even though the article does not distinguish between the independent duty of the intermediary in disclosure and the assureds' duty of disclosure, subsequent articles in the RII2011 indicate that the disclosure meant is the disclosure by the assured. This can be inferred from Art 44(e), which reads as follows,

²¹⁷⁵ Art 32, 42 IMCOCR2008.

²¹⁷⁶ Section B, Art 43(f), Art 44(a), Art 44(d) RII2011.

²¹⁷⁷ See Ch 5 under 5.3.1.

²¹⁷⁸ See above under 6.2.2 ; ICOBS 5.1.4 ; *Jones v Environcom Ltd* [2010] EWHC 759 (Comm), [2010] Lloyd's Rep IR 676; See also *Synergy Health (UK) Ltd v CGU Insurance Plc* [2010] EWHC 2583 (Comm), [2011] Lloyd's Rep IR 500.

²¹⁷⁹ Section C, Art 51 (a) RII2011.

²¹⁸⁰ Part 2, Art 8 (j) RII2011.

“Intermediaries shall: e) disclose on behalf of clients all material facts within their knowledge and give a fair presentation of the risk profile of clients to the insurance company.”

That means that, unlike the MIA1906,²¹⁸¹ insurance intermediaries under Saudi insurance laws do not have an independent duty of disclosure. In other words, they do not have to volunteer material information to the insurer which they have knowledge about or should have knowledge about, in any capacity, other than that information communicated to them by their clients who seek insurance. For that reason, their duty is nothing but mere communication of material information that the assureds have disclosed.

The author supports this approach by the Saudi insurance laws, and recommends a similar approach be followed by the MIA1906, by abolishing the independent duty of disclosure provided in section 19 (a). This recommendation is logical, since the contract of insurance is a contract between the assured and the insurer and therefore its validity must not depend on information held by someone who is not part of the contract. It may be argued that an insurance intermediary is part of the contract by being an agent of the assured or the insurer as the case maybe. Nonetheless, it must be remembered that the intermediary is not represented in the contract by his own capacity, and the results of the contract will not affect him personally. In the previous chapter, the author argued in favour of the abolishment of the duty of disclosure on part of the assureds,²¹⁸² and that applies *a fortiori* to insurance intermediaries.

This abolishment can be opposed by the fact that it encourages fraud between intermediaries, through concealing material information from the insurer. In the author’s view, this situation

²¹⁸¹ See above under 6.2.2.

²¹⁸² See Ch 5 under 5.7.2.

can be prevented by articulating provisions of fraudulent concealment of material information by the intermediary. This information must be confined to what is known to the intermediary in his capacity as an intermediary for the assured in the course of the relevant transaction, not in his own knowledge or in his professional capacity in general. Such a provision can catch fraud by the intermediaries who know material information and yet deliberately conceal it. The reason behind suggesting confining the information in this way is that in no stages of the contract the intermediary is treated as part of the contract with his own capacity. Accordingly, there is no reasonable ground to treat him as such for disclosure purposes. Another point to bear in mind is that in the CIA2012 the duty of disclosure is abolished as a whole for consumers.²¹⁸³ Therefore, it seems more logical to narrow the information that must be disclosed to only that known to the intermediary in his capacity as an intermediary in the relevant transaction, and only when it would constitute fraud not to disclose it. Moreover, such a suggestion could lead to avoiding possible conflicts with confidentiality issues, if the intermediary has to disclose information known to him in his professional capacity in general.

Another type of disclosure that can be found in the RII2011 is the disclosure of commissions.²¹⁸⁴ An intermediary is bound to disclose to his client any proceeds or commissions related to his policy.²¹⁸⁵ Also, the intermediary must notify the clients in writing of any further fees or charges for the services related to the policy.²¹⁸⁶

²¹⁸³ CIA2012, s 2, s11; LCCP2007 para 4.13.

²¹⁸⁴ See below.

²¹⁸⁵ Art 47(a) RII2011; See also Art 40 IMCOCR2008.

²¹⁸⁶ Art 47(b) RII2011.

In contrast, disclosure of commission by insurance intermediaries in English insurance laws is less transparent. The intermediary is bound to disclose his commission only if requested by the client and not voluntarily.²¹⁸⁷ In addition, the client requesting such a disclosure must be classified as a commercial client, which means that consumers do not have this right to request such information.²¹⁸⁸ However, under Saudi insurance laws, the intermediary must disclose his commission for the services he provides for all kinds of clients.

The author argued earlier against this position and in favour of including all kinds of clients in disclosure of commission.²¹⁸⁹ The question that lingers is: does disclosure of commission really achieve fairness for the assured? Compensation of intermediaries can take many forms, such as premium-based commissions, contingent commissions, fees for services, and non-cash compensations.²¹⁹⁰ Contingent commission is a percentage of the premium based on factors such as profitability, persistency and volume of business placed on the insurer and constitutes about 4–5% from the brokers' revenues.²¹⁹¹ Its dependence on such factors makes it the most controversial compensation for the insurance intermediary, since it can create a good case of conflict of interest, namely the interest of the assured to have cheap premiums and a suitable cover for his needs on one hand, and the interests of the intermediary in sealing the deal with the insurer who pays him the best contingent commission on the other. This commission can result in an expensive premium with no need for it and can compromise the urge to search for low prices which can be more suitable to the assured's needs. The author

²¹⁸⁷ See above under 6.2.1.

²¹⁸⁸ Ibid.

²¹⁸⁹ Ibid.

²¹⁹⁰ See J.D. Cummins, and N.A Doherty 'The Economics of Insurance Intermediaries' (2006) 73 (3) *Journal of Risk and Insurance* 354, 347.

²¹⁹¹ Ibid.

does not intend to question such a compensation scheme, which is considered a market practice. However, it is important to explore how much benefit there is for disclosing this commission to assureds.

True, assureds may have the awareness after commission disclosure and the chance to make informed decisions. However, what if they still have doubts about a conflict of interest? Does disclosing the commission practically dispel such doubts, or is it just a fact they must accept without a choice? The author's view is that such a disclosure may have the appearance of benefiting the assured, but is useless in terms of removing such conflict of interest. It cannot be denied that such a disclosure can give the assured the chance to negotiate an informed deal with other arrangements, but on the other hand that chance can only be grasped by big businesses that are in a powerful position to negotiate the terms of the contract. Therefore, consumers and small businesses will be stripped of any benefit from such a disclosure, as they will not have true choice or a chance to remove any potential harm from such commissions.

Having said that, it is worth noting that the RII2011 places considerable precautionary provisions to prevent any conflict of interest between the brokers and their clients, to avoid any commission influence.²¹⁹² First of all, it announces that brokers must “*take reasonable measures to identify and address conflict of interest*” to maintain fairness in the client's treatment and must place the interests of the clients above their own interests in case of any conflict.²¹⁹³ Moreover, brokers have to provide clients with comparisons between potential policies from different insurance companies and justify their recommendation for the best

²¹⁹² See below.

²¹⁹³ Part 2, Art 9 (a) RII2011; In English laws and regulations, the ICOBS does not provide a conflict of interest provision except in claim handling, but, a general conflict of interest provisions in the SYCS can be applied and protect the assureds from the conflict of interest in commissions, see above under 6.2.1. and 6.2.2.

policy explaining its limits and benefits.²¹⁹⁴ The selection of the policy in question must not depend on the commission that the broker gains from the insurance company or on the associations of the intermediary with some insurance companies.²¹⁹⁵ Also generally, intermediaries must not encourage their customers to annul their present insurance policies or to disapprove any other offers for coverage based on unfair assessment driven by the urge to increase commission.²¹⁹⁶ As said before in the English position, even these measures can reduce the problem, but still the assured may not be certain if such measures and management of conflict of interest are enough to prevent him from any harm or not.²¹⁹⁷ However, the IMCOCR2008 as mentioned in chapter 5 provides that any conflict of interest must be disclosed disregarding any measures taken which puts the customer in the picture from the beginning.²¹⁹⁸

²¹⁹⁴ Part 2, Art 9(b) RII2011.

²¹⁹⁵ Part 2, Art 9(c), (d) RII2011; See also Art 36 IMCOCR2008 where a similar requirement is stressed on the intermediary. In specific the broker must provide different quotations and explain his reasons for recommendation. If the broker does not choose the cheapest quotation (for non-protection policies), he must explain why and provide the details of the cheapest quotation. If he takes a higher commission on the recommended policy, he must also explain such a matter to the customer; See ICOBS 2.2.

²¹⁹⁶ Part 2, Art 8 (h) RII2011.

²¹⁹⁷ See above under 6.2.2.

²¹⁹⁸ Art 19 IMCOCR2008 ; Compare with SYCS 10.1.8 where disclosure of the conflict of interest is not required unless the measures taken to manage the conflict of interest are not enough to ensure with reasonable trust that harm on the assured will be prevented . However, such disclosure must not undermine the management of the conflict of interest itself (SYCS 10.1.9).

6.4 CONCLUSION

It can be concluded that a general duty of honesty and fairness as part of the intermediaries' is found in Saudi insurance laws.²¹⁹⁹ Regarding the determination of the exact legal position of the intermediary to impute knowledge, errors and omissions, whether on the assured or the insurer, English insurance laws incur liability only on the placing broker and treat the insurance intermediary as the assured's agent unless he is the insurer's appointed representative or under his direct control. However an independent broker who is usually regarded as the assured's agent, may be considered as the insurer's agent if he has the authority to bind cover, whereas the situation of single and multi-tied agents is still not clear with inconsistent cases.²²⁰⁰ Moreover, case law developed a rule where the intermediary will be always the assured's agent in filling in proposal forms.²²⁰¹ The CIA2012, which only concerns consumer assureds, numerates certain cases where the intermediary is the insurer's agent and where these are not satisfied, the intermediary will be presumed to be an agent for the assured.²²⁰² However, the situation is not decisive and depends on the relevant circumstances to suggest that the intermediary is an agent for the insurer or the assured. The author discussed the need for a more clear approach for consumers.²²⁰³

On the other hand, in Saudi insurance laws it is not clear on which broker the liability will be incurred, but a distinction is placed between 'insurance agents' who are considered the insurers' agents and represent the insurer including single-tied and multi-tied agents, and

²¹⁹⁹ See above under 6.2.2; 6.3.2.

²²⁰⁰ See above under 6.2.1.

²²⁰¹ Ibid.

²²⁰² Ibid.

²²⁰³ Ibid.

‘brokers’ who are the considered the assureds’ agents and conduct insurance services for the assured with the insurer.²²⁰⁴ An approach of decisiveness regarding answers in the proposal form is adopted, together with burdening the assured with the whole responsibility of his answers, which is somehow similar to the English position.²²⁰⁵

Under the MIA1906 which applies only to business insurance, disclosure of the intermediaries includes disclosing information that must be disclosed by the assured, and an independent duty of disclosure on the intermediary to disclose material information known to him or should have been known by him. Failure to disclose such information gives the insurer the right to avoid the policy²²⁰⁶ Also, the agent can be liable to his principle in damages.²²⁰⁷ The LCCP2012 suggests that all intermediaries acting on behalf of a certain business assured must disclose the information they withhold or receive in their capacity as agents of that business assured only, and any information they avoided to possess in a deliberate manner.²²⁰⁸ Additionally, the LCCP2012 proposes that a remedy against the business assured will exist in case of the failure by his broker who is required to make reasonable enquiries on his behalf to disclose matters which could have been revealed by such reasonable enquiries proportionate with the circumstances of the insurance conducted.²²⁰⁹ Finally, the LCCP2012 proposes the abolishment of section19 (b) of the MIA1906.²²¹⁰ The Insurance Contract Law

²²⁰⁴ See above under 6.3.1.

²²⁰⁵ Ibid.

²²⁰⁶ See above under 6.2.2.

²²⁰⁷ Ibid.

²²⁰⁸ Ibid.

²²⁰⁹ Ibid.

²²¹⁰ Ibid.

Draft Bill incorporated most of the LCCP2012 proposals and proposed that section 19 of the MIA1906 is to be repealed and that alternative provisions will apply.

Under the FSMA2000, the intermediary has to disclose information regarding his identity, the scope of service provided, fees and commissions if requested by commercial customers.²²¹¹ The author argues the advantages of disclosing the intermediary's scope of service and suggests an explanation of the results of providing a type of service to the assured.²²¹² Also, the author argues in favour of including all kinds of assureds in disclosure of commission.²²¹³ The breach of such requirements can give a claim in damages for the assured under section 150 of the FSMA2000, which is now replaced by section 138D of the Financial Services Act 2012.²²¹⁴

In contrast, the Saudi insurance laws only place on the intermediary a disclosure duty of material information that should be disclosed by the assured, with no independent duty on the intermediary, which was argued to be a favourable approach.²²¹⁵ Other aspects of disclosure include disclosure of proceeds and commissions, the real benefit of which the author questions, together with the measures included to avoid conflict of interest.²²¹⁶

²²¹¹ Ibid.

²²¹² Ibid.

²²¹³ Ibid.

²²¹⁴ Ibid.

²²¹⁵ See above under 6.3.2.

²²¹⁶ Ibid.

It must be remembered that the insurance intermediaries' role is vital in many insurance transactions, especially in the English market.²²¹⁷ The significance of their role cannot be denied as in many transactions they can have the authority to sign the proposals to the extent that the actual assured seems to be isolated.²²¹⁸ Such significance justifies the need for more clarity in laws surrounding their performance of duties in both systems.

The remedies available for the insurance parties if that duty is breached will be reviewed in the next chapter, for both Saudi and English insurance laws.

²²¹⁷ See above under 6.1.

²²¹⁸ Ibid.

CHAPTER 7

THE REMEDIES FOR BREACHING THE DUTY OF GOOD FAITH IN ENGLISH AND SAUDI INSURANCE LAWS

7.1 INTRODUCTION

In the earlier chapters, the main elements relating to the duty of good faith were discussed.²²¹⁹ In this chapter, the remedies available to the parties when this duty is breached will be analysed. The legal remedies available to the parties of the contract if the duty of good faith is breached are important to provide protection for the innocent party and to protect the existence of duty itself. The problem is that remedies may be too extreme or too lenient to fulfil such aims. In the MIA1906 for example, the harshness of the all or nothing remedy when the duty of good faith is breached²²²⁰ raised considerable criticisms²²²¹ and made courts try to limit the duty as much as possible to escape from its extreme consequences.²²²² Another

²²¹⁹ See Ch 5 and Ch 6.

²²²⁰ See MIA1906, s 17 and below.

²²²¹ See for example, H. Bennett, 'Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law' [1999] LMCLQ 165, 211; Sir A. Longmore, 'An Insurance Contracts Act for a New Century' [2001] LMCLQ 356, 366; P. Eggers, 'Remedies for the Failure to Observe the Utmost Good Faith' [2003] LMCLQ 249, 255; That led to several reform proposals by the Law Commissions for business and consumer insurance, and for consumers the proposals ended up by adopting the CIA2012 ; See LCCP2007; LCCIL2009; LCCP2011 ; LCCP2012.

²²²² For example, fraudulent claims and good faith were treated as separate issues to escape the remedy of avoidance *ab initio* (*K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 ; *Agapitos v Agnew (The Aegeon) (No 1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 57) ; Also in *Gan Insurance Co v Tai Ping Insurance Co (No2)* [2001] EWCA Civ 1047, [2000] Lloyd's Rep IR 667 (Mance L J) the obligation of the insurer to consider the assured's interests when negotiating with third parties was classified as a contractual obligation rather than a post-contractual duty of good faith; See Ch 5 under 5.9 for more.

problem is when there are no clear remedies provided in the laws like in Saudi insurance laws for example which causes uncertainty and predictability issues.²²²³

This chapter will provide an insight to the legal remedies available when the duty of good faith is breached in English and Saudi insurance laws. The chapter will begin by reviewing the English legal remedies for pre-contractual breaches of good faith in the MIA1906 which now applies only to business assureds, the FCA rules and the FOS. It will then examine the remedies in consumer insurance contracts under the CIA2012,²²²⁴ along with the suggested business reforms as they are in the LCCP2012 and the draft clauses of the Insurance Contract Law Draft Bill, and the issues related to the loss of the right to avoid and damages. After that, the legal remedies for post-contractual breach of good faith will be considered including issues of fraudulent claims and damages for late payment of claims by the insurer. In the second part of the chapter, the legal remedies of breaching the duty of good faith will be explored in Saudi insurance laws and regulations and specifically under the CCL1931, the LSCIC2003, the IMCOCR2008, and the AFR2008. Also they will be reviewed in the UCMIP and in the practice of the IVDRC. Finally, the author develops suggestions and recommendations to arrive at what can be suitable remedies for breaching the duty of good faith in Saudi insurance laws.

This chapter will complete the comparison between the English and the Saudi Insurance laws as regards the duty of good faith. It will provide a fuller picture of the duty by explaining the consequences of breaching it, which is important to comprehend the duty as a whole in each system. It will provide suggestions to develop the remedies to have a more just and fair approach towards them in Saudi insurance laws.

²²²³ See below for more.

²²²⁴ The CIA2012 received the royal assent 8th of March 2012 and came into force on the 6th of April 2013 (Commencement order 2012, SI 2013/450).

7.2 LEGAL REMEDIES IN ENGLISH INSURANCE LAW

7.2.1 Remedies For Pre-Contractual Breach Of The Duty Of Good Faith

I MIA1906 (Business Insurance Contracts: The Current Position)

The remedies provided in the MIA1906 apply now only to business insurance contracts after the enforcement of the CIA2012 which will be applied to consumer insurance contracts instead of the MIA1906.²²²⁵

The MIA1906 provides avoidance as the only remedy available to the insurer and the assured if the duty of good faith is not observed by either of the parties in the insurance contract.²²²⁶ Also, under the MIA1906, when the assured fails to disclose or misrepresents material information, the insurer's remedy will be the avoidance of the contract.²²²⁷ The avoidance remedy will be *ab initio*, returning the parties to their position before the existence of the contract.²²²⁸ In that sense, all claims will be refused, and premiums returned, aiming to return the parties as they were before conducting the contract.²²²⁹ However, for the premiums, if the

²²²⁵ See above.

²²²⁶ MIA1906, s 17.

²²²⁷ MIA1906, ss 18-19 ; It must be noted that the insurer cannot affirm the contract and refuse the claim (*Anderson v Fitzgerald* (1853) 4 HL Cas 484; *Biggar v Rock Life* [1902] 1 KB 516).

²²²⁸ *Brit Syndicates Ltd v Italaudit SpA* [2008] UKHL 18, [2008] Lloyd's Rep IR 601.

²²²⁹ *Ibid*, MIA1906, s 84(1); *West v National Motor and Accident Insurance Union* [1955] 1 All ER 800; *Intermunicipal Realty & Development Corp v Gore Mutual Insurance Co* [1981] 1 FC 151.

policy provides otherwise, or in case of fraud, the premiums will not be returned.²²³⁰ The remedy is all or nothing, and the proportionality principle is not applied.²²³¹

If avoidance by the insurer was not justified,²²³² the assured will have the right for damages as the insurer will be in breach of the contract allowing repudiation.²²³³ The damages will include losses incurred by the assured because of the insurer's conduct. Also, the assured will have the right to terminate the contract from the date of breach or to affirm it, and here the insurer can defend himself with any available defence for him after repudiation.²²³⁴

The controversial, one-sided remedy for breaching the duty of good faith under the MIA1906 has attracted judicial²²³⁵ and academic²²³⁶ debates criticising its harshness and unsuitability

²²³⁰ MIA1906, s 84(1); *Broad & Montague Ltd v South East Lancashire Insurance Co Ltd* (1931) 40 Ll LR 328; The fraud exception is clear for marine insurance cases, but less clear for non-marine insurance cases.

²²³¹ It must be noted that proportionality is applied as will be seen below in the CIA2012 regards careless misrepresentation; It must be noted that avoidance by the insurer can be by notifying the assured or by having a declaratory court relief ; *K/S Merc-Skandia XXXXII v Certain Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 ; R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-075.

²²³² This can be imagined if there is: no misrepresentation, or no non-disclosure, or no materiality, or no inducement to the contract by the risk presented, or if the duty of good faith or the breach of it, is waived; R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-075.

²²³³ *Transthene Packaging v Royal Insurance (UK) Ltd* [1996] LRLR 32.

²²³⁴ Ibid.

²²³⁵ For example, *K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep 563 [45] (Carnwath J).

for the 21st century, and made courts try to limit the duty as much as possible to escape from its extreme consequences.²²³⁷ This led to several reform proposals by the Law Commissions,²²³⁸ and for consumers, the proposals ended up by adopting the CIA2012.²²³⁹ One of the criticisms was that the remedy of avoidance *ab initio* may not be proportionate with the breach, which gives the feeling of a penalty element.²²⁴⁰ Insurers can avoid the contract and refuse all claims even if the breach was minor and the assured will be denied all his claims, even if they are fully paid for.²²⁴¹ Also, such a remedy does not consider the state of mind of the assured: whether he is deliberate, honest, or negligent when committing such a breach, which seems unfair for the reasonable assured.²²⁴² It must be borne in mind that the assured

²²³⁶ For example, Sir A. Longmore, ‘An Insurance Contracts Act for a New Century’ [2001] LMCLQ 356, 366 ; P. Eggers, ‘Remedies for the Failure to Observe the Utmost Good Faith’ [2003] LMCLQ 249, 255; H. Bennett, ‘Mapping the Doctrine of Utmost Good Faith in Insurance Contract Law’ [1999] LMCLQ 165, 211.

²²³⁷ For example, fraudulent claims and good faith were treated as separate issues to escape the remedy of avoidance *ab initio* (*K/S Merc-Scandia XXXXII v Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802 ; *Agapitos v Agnew (The Aegeon) (No 1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 57) ; Also in *Gan Insurance Co v Tai Ping Insurance Co (No2)* [2001] EWCA Civ 1047, [2000] Lloyd's Rep IR 667 (Mance L J) the obligation of the insurer to consider the assured's interests when negotiating with third parties was classified a contractual obligation rather than a post-contractual duty of good faith; See Ch 5 under 5.9 for more.

²²³⁸ For example LCCP2007; LCCIL2009; LCCP2011; LCCP2012.

²²³⁹ The CIA2012 received the royal assent 8th of March 2012 and came into force on the 6th of April 2013 (Commencement order 2012, SI 2013/450).

²²⁴⁰ LCCP2007 paras 2.1–2.40.

²²⁴¹ Ibid.

²²⁴² Ibid.

contracted for insurance to have a peace of mind and such a result defeats his reasonable expectations in providing cover and affects his trust in the industry as a safety net.²²⁴³ Adding to the dilemma, courts have not developed alternative remedies such as damages, which can be more appropriate than the current remedy and suggestions for damage were refused.²²⁴⁴ It

²²⁴³ LCCP2007 paras 1.38–1.73.

²²⁴⁴ Damages were suggested by Steyn J with reservations as a remedy available to the assured against the insurer on the basis of tort of negligence instead of damages due to the insurer's breach duty of good faith in *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1987] 2 All ER 923, but that was rejected by the Court of Appeal in *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947, where the view was that tort cannot govern a commercial contract relationship between the parties, and the only situation where a duty of care which lies in the duty to speak will be imposed when there is an "assumption of responsibility", and on the facts there was no such assumption on the underwriters to the bank. The House of Lords did not have a final view on the matter as to whether the duty of good faith can incur a relationship which imposes a duty of care, and the matter was open (damages for the tort of negligence cannot be imposed as well); Therefore, it is evident that a duty of good faith itself does not incur a duty of care; however, a duty of care can be imposed if the general requirements are present, i.e. assumption of responsibility. However, in the present cases the general requirements were not present in the view of courts (insurers did have further duties (e.g. to alert the assured of the risk which lies in the policy, *Searle v AR Hales & Co Ltd* [1996] LRLR 68) than their normal duties under the insurance contract. In *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep 483, imposing a duty of care in the insurance contract which lies in the duty to speak was rejected, but Rix LJ stated that such duty can be there only in exceptional circumstances, e.g. the insurer made himself an adviser to the assured on coverage. In *Gorham v British Telecommunications Plc* [2001] Lloyd's Rep IR 531, an assumption of responsibility was found on the insurers to offer precise investment advice when selling a pension plan, and therefore damages were found until the precise advice was offered; Also a remedy in damages for breaching Financial Services Act 1986, s 47 (now FSMA2000, s 397) which criminalises giving false information or fraudulently non-disclosing material facts was rejected (*Aldrich v Norwich Union Life, Norwich Union Life v Qureshi* [2000] Lloyd's Rep IR 1) as it did not give civil rights, and it did not give wider disclosure duty than common law; For the insurers, avoidance, certainly it is more beneficial than damages; however, damages may be beneficial if insurers lose their right to avoid (See *Argo Systems FZE v Liberty Insurance Pte Ltd (Copa Casino)* [2011] EWHC 301

must be noted that avoidance is not of practical use to the assured in case of insurers' breach.²²⁴⁵ The assured will not benefit from avoiding the policy, or the return of premiums,

(Comm), [2011] 2 Lloyd's, [2011] EWCA Civ 1572 (Comm), [2012] 1 Lloyd's Rep 129), but damages will be only limited to misrepresentation and not non-disclosure (see below under 'loss of right to avoid and damages'). Regarding the premiums, the insurer must return them to the assured in case of avoidance (unless the policy provides otherwise or in fraud) or deduct them from his loss when he seeks damages instead of avoidance, and therefore there is no benefit of damages for him. For the matter of the expense which the insurer can incur in policy inception and claim investigation, it is always possible for him to add a provision on the forfeiture of the premium in case of avoidance, R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-079; It must be noted that it is not clear if damages under the Misrepresentation Act 1967, s 2(1) can apply to insurance contracts since its application will challenge the rule that the only remedy is avoidance and the issue is not touched upon thoroughly by courts, even though it seems that the presumption is that they are included within the provision (*Toomey v Eagle Star Insurance Co (No 2)* [1995] 2 Lloyd's Rep 88; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep IR 191 (Aikens J)). In any case, the inclusion of insurance contracts under the provision seem to have no justifications against it especially regarding declaration policies or reinsurance treaties (no duty of utmost good faith is required in those examples (*HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep IR 191 (Aikens J)). The limitation though is that the provision will only apply to misrepresentation and not non-disclosure. Also assuming that insurance contracts are included under the Misrepresentation Act 1967, s 2(2), the provision can benefit the assured when insurers avoid the policy for innocent misrepresentation which does not have any relevance to the loss (like the past provision it can only apply to misrepresentation not non-disclosure). However, the application is not allowed by courts in reinsurance and probably commercial insurance as the parties will be alert to the results of breaching the duty (*Highlands Insurance Co v Continental Insurance Co* [1987] 1 Lloyd's Rep 109; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1992] 1 Lloyd's Rep 101; *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250; [2001] 2 Lloyd's Rep 483), while such an approach is not certain for consumer insurance; R. Merkin *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-80, 81.

²²⁴⁵ R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-124.

especially when a loss occurs. Instead, he will prefer to retain the cover and be fully reimbursed by the insurer.²²⁴⁶

II FCA Rules (Consumer and Business Insurance Contracts)

It is worth mentioning that the FCA rules embedded in the ICOBS provide other remedies for assureds who are faced with breach of the duty of good faith. The ICOBS contains binding

²²⁴⁶ Situations where the assured may possibly benefit from the duty of the good faith owed by the insurer but did not because of the absence of damages include: the knowledge of the insurer of risks associated with the dangerous activities of the insurance cover sought by the assured, and which the assured did not appreciate. However, it is submitted that such knowledge is immaterial (*Searle v AR Hales & Co Ltd* [1996] LRLR 68; *Norwich Union Life Insurance Society v Qureshi* [1999] Lloyd's Rep IR 263, [2000] Lloyd's Rep IR 1). But in case it was material, the absence of damages will render the remedy of avoidance pointless. Another situation is suffering a loss which is not within the limits of the policy, defeating the assured's reasonable expectations (*La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947). It can be argued that loss which is only compensated by damages which are extra contractual can be a proof that the insurers' duty of good faith is not meant to make insurers as advisers or widen the scope of their disclosure to include the explanation of the policy and its coverage (*The Ainikolas* (1996) *Lloyd's List*, 5 April; *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947). However, it was held that subsequent to a loss incurred within the policy, when the assured realises that the premium paid was high compared to the risk which he believed at the time it was worth the premium, in a way not in relation to the loss, the assured will be entitled to a refund for part of unnecessary premium and the rule not allowing dividing the premium will not be applied (MIA1906, s 84). Also, he can affirm the policy and claim the loss and damages for the insurer's breach of the duty of good faith. In that way damages can be available on a limited basis; (*La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947 (Jauncey L)); Estoppel against the insurers may be raised when they give the assured the impression that the policy has a certain meaning, while it in fact it means another thing (*Sherdley v Nordea Life and Pension SA* [2012] EWCA Civ 88, [2012] 2 All ER (Comm) 725); R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-124.

rules in its various sections to maintain good faith and provide disclosure in the insurance contract, which apply to insurers and insurance mediators carrying non-investment insurance.²²⁴⁷ These rules comprise guidelines for the regulated firms concerning information about the firm, including its services and fees and commission disclosure,²²⁴⁸ determining assureds' needs and advised sales,²²⁴⁹ product disclosure including pre-contractual information,²²⁵⁰ and claims handling.²²⁵¹ The breach of such rules, including incidents of rejecting the claim unreasonably gives the right for disciplinary action by the FCA, e.g. through fines' enforcement.²²⁵² Nevertheless, such action does not bring much of a benefit to the assured.²²⁵³ However, such a breach can give the right for damages under section 150 of the FSMA2000 which is now replaced by section 138 D of the Financial Services Act 2012,²²⁵⁴ if the assured brings a claim against the regulated firm for breaching a statutory duty. Such a claim is available, provided that the claimant is a 'private person'.²²⁵⁵ In

²²⁴⁷ ICOBS 1.1; ICOBS 2.2; See Ch 5 under 5.3; See Ch 6 under 6.2.2.

²²⁴⁸ ICOBS 4; Ibid.

²²⁴⁹ ICOBS 5; Ibid.

²²⁵⁰ ICOBS 6; Ibid.

²²⁵¹ ICOBS 8; Ibid.

²²⁵² FSMA 2000, s 66.

²²⁵³ Ibid.

²²⁵⁴ Financial Services Act 2012, sch 18, prt 1, s 12.

²²⁵⁵ FSMA2000 (Rights of Action) Regulations 2001, SI 2001/2256, Reg 3 provide that a private person is : "(a) *any individual, unless he suffers the loss in question in the course of carrying on—*

practice, however, such right is rarely pursued by consumers,²²⁵⁶ who prefer to resort to the FOS, which can grant them damages before bringing the matter to courts, which can be unusual and difficult path.²²⁵⁷

However, the FCA rules do not amend the MIA1906, but they do give additional right for the assureds that they did not have before. Hence, insurers can still rely on their legal rights in rejecting the claim unreasonably and a court may not challenge such action. That will lead to

(i) any regulated activity; or

(ii) any activity which would be a regulated activity apart from any exclusion made by article 72 of the Regulated Activities Order (overseas persons); and

(b) any person who is not an individual, unless he suffers the loss in question in the course of carrying on business of any kind;

but does not include a government, a local authority (in the United Kingdom or elsewhere) or an international organisation.

(2) For the purposes of paragraph (1)(a), an individual who suffers loss in the course of effecting or carrying out contracts of insurance (within the meaning of article 10 of the Regulated Activities Order) written at Lloyd's is not to be taken to suffer loss in the course of carrying on a regulated activity"; However, it was argued that the Law Commissions got it wrong in the interpretation of the term private persons provided in the FSMA rule *"It is thus not correct to say (as the Law Commissions do at para 5.19 of their paper) that "these claims are not open to businesses". They are open to most businesses in limited circumstances and to some businesses in all circumstances"*; see J. Goodliff, 'Late Payment of Insurance Claims: A Legal or a Regulatory Issue?' (2011) 123 Journal of the British Insurance Law Association 23, 24-25.

²²⁵⁶ Only few reported cases can be found e.g. *Spreadex Ltd v Sekhon* [2008] EWHC 1136 (Ch), [2009] 1 BCLC 102 which concerned a breach of ICOBS r 7.10.5.

²²⁵⁷ LCCIL2009 para 2.45.

inconsistent and strange results as the insurer may win a case in court but still be subject to a disciplinary action by the FCA.²²⁵⁸

III FOS (Consumer and Small Business Insurance Contracts)

The FOS, which can view consumer and small business insurance cases, also attempted to mitigate the harsh effects of the MIA1906 even before the promulgation of the CIA2012 for consumer assureds. For example, the FOS did not apply strict law and applied what is “*fair and reasonable in all the circumstances*”,²²⁵⁹ developing its own approach in dealing with cases. Also, it modified the principles underlying the MIA1906 (which now applies only to business assureds) even more than the FCA rules, by abolishing the duty of disclosure and offering proportionate remedies in negligent misrepresentations.²²⁶⁰ The FOS also offered avoidance for deliberate and reckless misrepresentations, and the payment of the claim, when the assured acted reasonably or innocently²²⁶¹ and its approach is adopted now in the

²²⁵⁸ LCCP2007 paras 3.11-3.21; LCIL2009 paras 2.38–2.39; ICOBS 8.1.1. unreasonable rejection may be by avoidance or termination of the policy; After the enactment of the CIA2012, unreasonable rejection of a claim by the insurer in consumer insurance means if the rejection was for a misrepresentation which is not a qualifying misrepresentation or for a breach of a warranty or condition which is not connected to the loss, subject to some exceptions (ICOBS 8.1.2; ICOBS 8.1.3.)

²²⁵⁹ FSMA2000, s 228 (2); The FCA handbook, Dispute Resolution: Complaints (DISP) 3.6.1.

²²⁶⁰ LCCIL2009 paras 2.48-2.53; Ombudsman News, Issue 27 (April 2003); Issue 46 (June 2005); and Issue 61 (May 2007); and the FOS Consumer Factsheet on Medical Non-Disclosure in Insurance (August 2007).

²²⁶¹ Ibid.

CIA2012 which only applies to consumer assureds.²²⁶² It must be noted the FOS only protects consumers and small businesses, where their claims do not exceed £100,000.²²⁶³

IV CIA2012 (Consumer Insurance Contracts)

After the enactment of the CIA2012, the MIA1906 no longer applies to consumer insurance contracts, as the CIA2012 will be applied instead.²²⁶⁴ The main aim of the Act is to protect the reasonable and honest assured and his reasonable expectations.²²⁶⁵

The CIA2012 abolishes the duty to volunteer information and any rule of law relating to the duty of good faith embedded in section 17 of the MIA1906 regards the pre-contractual stage and replaces it with the duty of reasonable care by consumer assureds not to make a misrepresentation.²²⁶⁶ Regarding misrepresentation, only ‘qualifying misrepresentation’ will give insurers a remedy.²²⁶⁷ A qualifying misrepresentation can be deliberate or reckless, or careless, and different remedies are provided accordingly.²²⁶⁸

²²⁶² CIA2012, s 2-4; sch 1, prt 1.

²²⁶³ Ibid 3.4–3.8 ; The FCA handbook, Dispute Resolution: Complaints (DISP) 2.7.10.

²²⁶⁴ The CIA2012 received the royal assent 8th of March 2012 and came into force on the 6th of April 2013 (Commencement order 2012, SI 2013/450).

²²⁶⁵ See LCCIL2009.

²²⁶⁶ CIA2012, ss 2 , 3 ; for more see Ch 5 under 5.3.

²²⁶⁷ A qualifying misrepresentation happens only if before entering the consumer insurance contract or variation:

“(a) the consumer made the misrepresentation in breach of the duty set out in section 2(2), and

For deliberate and reckless misrepresentations,²²⁶⁹ the CIA2012 provides that avoidance is retained as a remedy. The insurer can deny all the claims, and keep the premiums unless it is unfair to the assured.²²⁷⁰

In respect of careless misrepresentation, this means that it is a qualifying misrepresentation, neither deliberate nor reckless.²²⁷¹ The CIA2012 opts for a proportionate remedy which takes a measure of what the insurer would have done if the consumer had taken reasonable care in

(b) The insurer shows that without the misrepresentation, that insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms.” ; see CIA2012, s 4; See also Ch 5 under 5.3.

²²⁶⁸ CIA2012, ss 4, 5.

²²⁶⁹ Deliberate or reckless misrepresentation is defined in CIA2012, s 5 (2) as a misrepresentation where the consumer:

*“(a) knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and
(b) Knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer.”*

The insurer must prove that the misrepresentation is deliberate or reckless, however, it can be presumed unless proven otherwise if:

*“(a) that the consumer had the knowledge of a reasonable consumer, and
(b) That the consumer knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer.”* see CIA2012, s 5 (5); See also Ch 5 under 5.3, and 5.10 for more.

²²⁷⁰ CIA2012, sch 1, prt 1, para 2; Situations where it will be unfair for the assured to retain the premium by the insurer can include: joint insurance where one of the assureds only is guilty of such behaviour; This is a little different than the MIA1906, where premiums are not returned by the insurer in case of fraud under s 84(1) and there is no recognition of such situations (Such position is clear for marine insurance but less clear for non-marine insurance cases).

²²⁷¹ CIA2012, s 5 (3).

not making a misrepresentation as set in section 2(2) of the CIA2012.²²⁷² If the insurer would have charged more, the claim will be reduced proportionally.²²⁷³ If the insurer would have entered the contract but on other terms, the policy will be treated as if those terms existed.²²⁷⁴ However, if the insurer would have refused to impose cover completely on any terms, the policy can be avoided and the premiums returned, just as the situation in MIA1906.²²⁷⁵

For the existence of the policy to the future in case of careless misrepresentation, it is provided that if there is no claim, the insurer can avoid the policy if he would have refused to impose cover completely.²²⁷⁶ However, if the insurer would have charged more or entered the contract on different terms, he will have the choice either: to notify the assured reasonably of the termination of the policy, but have to return to the assured the proportion of the premium which is not yet expired, or to notify the assured of the variation where he can accept the offer or reject it (policy will terminate in case of rejection).²²⁷⁷

In case there is a claim, the insurer will presumably have such rights provided he treats them as set in paragraphs from 6-8 in the schedule.²²⁷⁸ Life policies are excluded as there cannot be a right for termination by the insurer, and the policy will remain even though it will be

²²⁷² CIA2012, sch 1, prt 1, para 4.

²²⁷³ CIA2012, sch 1, prt 1, para 7 & 8.

²²⁷⁴ The does not include terms related to the premium, and the insurer cannot use the remedy to relieve him from paying the claim; CIA2012, sch1, prt1, para 6.

²²⁷⁵ CIA2012, sch 1, prt 1, para 5.

²²⁷⁶ CIA2012, sch1, prt 1, para 9.

²²⁷⁷ Ibid.

²²⁷⁸ Ibid; R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-47D.

amended if the assured approves of such amendments.²²⁷⁹ Regarding policy variations, if the policy variation can be treated in divorce from the subject matter of the contract, then the above remedies can apply to the claim varied only, and not the whole policy (the insurer can avoid the extension only or reduce his liability to the relevant claim, but has to pay the other claims).²²⁸⁰ However, if the policy variation cannot be treated in divorce from the subject matter of the contract, then the whole policy will be affected.²²⁸¹

V LCCP2012 (Business Insurance Contracts: Suggested Reforms)

The main difference between the business reforms in the LCCP2012 and the CIA2012 is in the duty of disclosure, as it is suggested to be retained as a default rule in the LCCP2012 while it is abolished in the CIA2012.²²⁸² Also, the LCCP2012 suggests retaining the duty of good faith in section 17 of the MIA1906, but only as an ‘interpretative principle’ not incurring any cause of action or separate remedies,²²⁸³ while the CIA2012 removes any rule of law relating to the aforementioned duty regarding the pre-contractual stage.²²⁸⁴ The duty of good faith in this sense will be used to interpret the contractual obligations and to prevent

²²⁷⁹ CIA2012, sch1, prt 1, para9.

²²⁸⁰ CIA2012, sch1, prt 2, para 11; see Ch 5 under 5.9.

²²⁸¹ The remedies in part 1 will be applied to the whole policy, and not just the variation ; CIA2012, sch 1 , prt 2, para 12 ; See Ch 5 under 5.9.

²²⁸² CIA2012, s 2; LCCP2012 prt 2; see Ch 5 under 5.3.

²²⁸³ LCCP2012 para 10.1 -10.19; see Ch 5 under 5.2; See also below under the issue of late payment of claims by the insurer.

²²⁸⁴ CIA2012 , s 2; see Ch 5 under 5.2.

using them in bad faith but with no special remedies.²²⁸⁵ The LCCP2012 distinguishes between dishonest conduct on one hand and non-dishonest conduct on the other.²²⁸⁶

In respect of remedies for dishonest breaches, avoidance, refusing all the claims and keeping the premiums is suggested as a suitable remedy.²²⁸⁷ No discretion is suggested for the court to return premiums to the assured, as with consumer insurance.²²⁸⁸

For non-dishonest breaches, a regime of proportionate remedies depending on what the insurer would have done had the assured complied with his duty is proposed as a default solution, similar to the regime adopted in the CIA2012 for careless misrepresentations.²²⁸⁹

The Law Commissions were aware of the difficulty of applying proportionate remedies in some situations, so their proposals were suggested only as a default regime.²²⁹⁰ Hence, parties can contract out of this default regime provided they do so in writing with clear decisive

²²⁸⁵ LCCP2012 para 10.1 -10.19; see Ch 5 under 5.2; See also below under the issue of late payment of claims by the insurer.

²²⁸⁶ LCCP2012 prt 9; See Ch 5 under 5.6 for definitions of not dishonest and dishonest conducts.

²²⁸⁷ LCCP2012 para 9.76.

²²⁸⁸ LCCP2012 para 9.73.

²²⁸⁹ LCCP2012 paras 9.39–9.40; It provides: avoidance, if the insurer would not have entered the contract at all, inclusion of terms which the insurer would have included, and reducing the payment of the claim if the insurer would have charged more on the premium in a proportionate manner. This last situation can be additional to the second situation concerning the inclusion of different terms.

²²⁹⁰ LCCP2012 para 9.85.

terms and after bringing the issue to the attention of the other party.²²⁹¹ For the future cancellation of the policy, the LCCP2012 suggests that when the proportionate remedies apply, either of the parties or both of them can have the right to cancel the policy to the future provided a reasonable notice is given.²²⁹²

The draft clauses of the Insurance Contract Law Draft Bill issued recently by the Law Commissions adopted most of the LCCP2012 suggestions.²²⁹³ As mentioned before, the draft Bill abolishes avoidance based on the breach of the duty of good faith for non-consumer insurance completely and hence, no special remedies will occur for its breach.²²⁹⁴ Also, the non-consumer proposer will have a duty to make a fair presentation of the risk.²²⁹⁵ Only a qualifying breach of such duty will entitle the insurer for remedies, and that will happen if the

²²⁹¹ LCCP2012 para 9.85; That can be a concern for small businesses which tend to buy insurance ‘off the shelf’ just like consumers due to the lack of bargaining power in the contract. There have been some arguments to include small businesses in the consumers’ regime since they lack the necessary knowledge and bargaining powers and, since their cases are heard already by the FOS in the same manner as consumers. It must be noted that an issue paper discussing the probability of establishing distinct regimes for smaller businesses was produced earlier on 2009 to favour them with consumer treatment. The main driver for the paper was problems with the former test. However, it was decided in the LCCP2012 not to continue with the former distinction and against producing specific rules for smaller businesses; see The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: Micro-Businesses, Should Micro-Businesses be Treated Like Consumers For The Purposes of Pre-Contractual Information and Unfair Terms?* (Issues Paper 5, April 2009); See LCCP 2012 Appendices A.

²²⁹² LCCP2012 para 9.62.

²²⁹³ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

²²⁹⁴ Insurance Contract Law Draft Bill, cl 14.

²²⁹⁵ Ibid, cls 3, 4.

insurer proves inducement, i.e. ‘but for’ the breach he would not have entered the contract or would have entered it based on other terms.²²⁹⁶ The draft Bill states that qualifying breaches entitling for a remedy can be deliberate or reckless, or neither deliberate or reckless.²²⁹⁷ For the deliberate and reckless breaches,²²⁹⁸ the insurer can avoid the contract, refuse the claims and retain the premiums, which is similar to the CIA2012 and that seems to be codifying the current law,²²⁹⁹ while a proportionate remedy for non-deliberate or reckless breaches will apply.²³⁰⁰ The proportionate remedy will depend on what the insurer would have done had the non-consumer assured complied with his duty to make a fair presentation of the risk in a way similar to the CIA2012.²³⁰¹ If the insurer would not have entered into a contractual relationship with the assured completely, the insurer can have a remedy in avoidance, refusing the claims under the policy; however, the premiums must be returned to the non-consumer assured.²³⁰² If the insurer would have accepted entering the contract, but would have changed the contract terms, the contract will be considered as if those terms were incorporated, provided they do not relate to the premium.²³⁰³ If the insurer would have entered the contract, but would have requested the premium to be higher than it was, the claim paid can be reduced in a proportionate manner, and that is despite entering the contract

²²⁹⁶ Ibid, cl 7(1).

²²⁹⁷ Ibid, cl 4.

²²⁹⁸ Ibid, cl 5, for definition of deliberate and reckless breaches; See also Ch 5 under 5.6.

²²⁹⁹ Ibid, sch1, prt1, cl 2.

²³⁰⁰ Ibid, sch 1, prt1, cls 3, 4.

²³⁰¹ Ibid.

²³⁰² Ibid, sch 1, prt1, cl 5.

²³⁰³ Ibid, sch 1, prt 1, cl 6.

on the same terms or different terms for other matters than the premium.²³⁰⁴ The draft Bill then explains how to calculate the proportionate reduction in the claim.²³⁰⁵ Thus, those proportionate remedies for qualifying breaches which are neither deliberate nor reckless seem to be an important change in the law, as the only remedy for the non-consumer insurance was avoidance of the policy under the MIA1906.²³⁰⁶ It must be noted that duty to make a fair presentation of the risk when the insurance contract is varied will apply to the variation only.²³⁰⁷ The duty if breached can entitle the insurer for proportionate remedies; however, they are yet to be drafted.²³⁰⁸

It is worth mentioning that contracting out of those rules by a disadvantageous term which puts the assured in a worse position than the draft Bill is not allowed for consumer insurance,²³⁰⁹ while it is allowed in non-consumer insurance provided transparency requirements are satisfied.²³¹⁰ However, using the basis of the contract clauses converting the

²³⁰⁴ Ibid, sch1, prt 1, cl 7.

²³⁰⁵ Ibid, sch 1, prt1, cl 8.

²³⁰⁶ MIA1906, ss 17, 84; The premiums were returned to the assured unless in case of fraud or if the policy provides otherwise.

²³⁰⁷ Insurance Contract Law Draft Bill, cl 2(3).

²³⁰⁸ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 2.78.

²³⁰⁹ Ibid, cl 15 ; for more detailed explanation on contracting out see Ch 5 under 5.10.

²³¹⁰ Ibid, cls 16, 17.

pre-contractual representations of the non-consumer proposer into warranties is prohibited in the draft Bill,²³¹¹ and parties cannot contract out of such position.²³¹²

In any case, rules on contracting out do not apply to settlement agreements or cancellation clauses.²³¹³ Therefore, in consumer insurance using less favourable terms than the default provisions in the Insurance Contract Law Draft Bill is allowed as the prohibition will not be applicable.²³¹⁴ Also, the conditions of transparency will not be needed for non-consumer insurance.²³¹⁵

- **Loss Of Right To Avoid And Damages**

Insurers may lose their right to avoid the contract for the breach of the duty of good faith, and that may be through waiver by affirmation²³¹⁶ or estoppel, a matter which will often arise when examining the claim by the insurer and will depend on the insurer's conduct or the communication which is directed to the assured.²³¹⁷ Waiver by affirmation and estoppel are

²³¹¹ Ibid, cl 8.

²³¹² Ibid, cls 16(2), 16(3) (a).

²³¹³ Ibid, cls 15(4),16(6).

²³¹⁴ Ibid, cl 15(4).

²³¹⁵ Ibid, cl 16(6).

²³¹⁶ It has been observed that the loss of the right to avoid by insurers is rarely touched upon by English courts and most cases were related only to losing the right to avoid by policy affirmation. R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-077.

²³¹⁷ For example , the statements of the insurer in a liability policy which are directed to the third party who may be a possible claimant of the assured indicating that he will not insist on his right to avoid, will not operate to preclude the avoidance of the policy. The reason is that the third party does not have a right under the policy since his claims are not directly against the insurer. That will apply even in the case of the assured's insolvency.

different in essence, even though they have a shared foundation and practical requirements.²³¹⁸

In waiver by affirmation, the insurer will be in a situation of election between two inconsistent rights, namely: the right to avoid the contract or to affirm it, because of a breach of the duty of good faith.²³¹⁹ The insurer must have actual knowledge of the breach of the duty of good faith, and the right to avoid, and can waive his right to avoid by express words or by conduct communicated to the assured in an unequivocal manner, and capable of inducing a reasonable assured in the position of the actual assured to believe that the insurer will not insist on his right to avoid.²³²⁰ The assured will not be required to act in return.²³²¹

On the other hand, in estoppel the insurer will act in a way where it will be unacceptable to avoid the policy, as there will be an unequivocal communication in words or conduct from

The same will apply if the communication was from the reinsurer directly to the assured (*Spriggs v Wessington Court School* [2004] EWHC 1432 (QB), [2005] Lloyd's Rep IR 474) Nonetheless, if the insurer/reinsurer practised his right by the policy to defend the rights of the third party, that may possibly be considered a waiver of his right to avoid (*Wood v Perfection Travel Ltd* [1996] LRLR 233).

²³¹⁸ *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 (Goff L).

²³¹⁹ *Liberian Insurance Agency v Mosse* [1977] 2 Lloyd's Rep 560; *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476; *Insurance Corp of the Channel Islands v Royal Hotel Ltd* [1998] Lloyd's Rep IR 151 ; *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2003] EWHC 3038 (Comm), [2004] 1 All ER (Comm) 495, [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764 ; *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 1705 (Comm), [2011] Lloyd's Rep IR 101.

²³²⁰ Ibid.

²³²¹ Ibid.

the insurer, and the assured will rely on that and act accordingly to his detriment.²³²² In contrast with waiver by affirmation, the insurer estopped is not required to have knowledge of the breach or the right to avoid, and the assured must act to his detriment relying on the insurer's representation.²³²³ Such distinction is important in relation to breach of warranty and breach of condition precedent where waiver by affirmation is not allowed, and only waiver by estoppel is available.²³²⁴ Both waiver by affirmation and estoppel require that the representation of the insurer to the assured is unequivocal.²³²⁵

In respect of waiver by affirmation, if the insurer elects one of the contradicting rights, he will be held by such election even though he was ignorant that it will result in waiver.²³²⁶ The conditions which must be satisfied to have a case of waiver by affirmation are summarised in

²³²² *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391; *Callaghan (t/a Stage 3 Discotheque) v Thompson* [2000] Lloyd's Rep IR 125; *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] Lloyd's Rep IR 489; *Lexington Insurance Co v Multinacional de Seguros SA* [2008] EWHC 1170 (Comm), [2009] Lloyd's Rep IR1.

²³²³ Ibid.

²³²⁴ *HIH Casualty & General Insurance Co v Axa Corporate Solutions (formerly Axa Reassurance SA)* [2002] Lloyd's Rep IR 325; *Kosmar Villa Holidays Plc v Trustees of Syndicate 1234* [2008] EWCA Civ 489, [2008] Lloyd's Rep IR 489.

²³²⁵ For example, continuing to negotiate is not an unequivocal communication (*Super Chem Products Ltd v American Life and General Insurance Co Ltd* [2004] UKPC 2, [2004] Lloyd's Rep IR 446); *Fortisbank SA v Trenwick International Ltd* [2005] EWHC 399 (Comm), [2005] Lloyd's Rep IR 464.

²³²⁶ *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850; *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391; *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] Lloyd's Rep IR 489; *Lexington Insurance Co v Multinacional de Seguros SA* [2008] EWHC 1170 (Comm), [2009] Lloyd's Rep IR1.

WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA ²³²⁷ and often repeated in cases, ²³²⁸ namely: the insurer must have actual knowledge of the breach of the duty of good faith (or non-disclosed or misrepresented facts), not only constructive knowledge and must have knowledge of the right to avoid, he must have a reasonable time for election, there must be unequivocal communication of the insurer's election to the assured which can be by express words or conduct and founding such matter will rely on the interpretation of a reasonable person found in the same position of the actual assured to the words or conduct of the insurer.²³²⁹ Most cases which may incur a waiver argument relates to the insurers' acts following a loss, and mostly in cases where the insurers state that the act will be without prejudice to the assured.²³³⁰

The waiver by affirmation can be expressed or implied. For express waiver by affirmation the matter will depend on the construction of the communication and its context.²³³¹ It also can

²³²⁷ [2003] EWHC 1706 (Comm), [2004] 1 All ER (Comm) 495 (Simon J) ; That was adopted by the Court of Appeal as well in *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764 ; *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 1705 (Comm) , [2011] Lloyd's Rep IR 101.

²³²⁸ *Liberian Insurance Agency v Mosse* [1977] 2 Lloyd's Rep 560; *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476; *Insurance Corp of the Channel Islands v Royal Hotel Ltd* [1998] Lloyd's Rep IR 151.

²³²⁹ *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2003] EWHC 1706 (Comm), [2004] 1 All ER (Comm) 495, [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764.

²³³⁰ *Callaghan (t/a Stage 3 Discotheque) v Thompson* [2000] Lloyd's Rep IR 125.

²³³¹ *Spriggs v Wessington Court School* [2004] EWHC 1432 (QB), [2005] Lloyd's Rep IR 474.

take a form of an agreement between the insurer and the assured in the contract.²³³² For implied waiver by affirmation, disregarding the other conditions, case law has demonstrated that some acts can be equal to waiver where there is an unequivocal communication to the assured. Examples include: policy payment with insurer's knowledge of breach,²³³³ coverage confirmation by deciding deliberately to accept future premiums,²³³⁴ terminating the policy in a method contradicting with avoidance *ab initio*,²³³⁵ practising a right conferred by the contract which contradicts with any plans to avoid the policy.²³³⁶

²³³² In *Talbot Underwriting v Nausch Hogan & Murray (The Jascon 5)* [2006] EWCA Civ 889, [2006] Lloyd's Rep IR 531, there was an agreement to assign the rights of the assureds against third parties to the insurers.

²³³³ *Barber v Imperio Reinsurance Co (UK) Ltd* (CA, 15 July 1993); *Cape Plc v Iron Trades Employers Insurance Association Ltd* [2004] Lloyd's Rep IR 75.

²³³⁴ *Scottish Equitable Life Assurance Society v Robert Buist and Others* (1877) 4 R 1076; *Simner v New India Assurance Co Ltd* [1995] LRLR 240; Also See *Scottish Coal Co Ltd v Royal and Sun Alliance Insurance Plc* [2008] EWHC 880 (Comm), [2008] Lloyd's Rep IR 718, where insurers knew about an undisclosed change in work technique, but approved to extend coverage; Compare with *Morrison v Universal Marine Insurance Co* (1873) LR 8 Ex 197, *Drake Insurance Co v Provident Insurance Co* [2003] EWCA Civ 1834, [2004] Lloyd's Rep IR 277, where insurers agreed to extend cover despite being aware of non-disclosure as to a change in the assured's working way.

²³³⁵ *Mint Security Ltd v Blair* [1982] 1 Lloyd's Rep 188; *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764 (By a policy term incurring cancellation); *O'Kane v Jones (The Martin P)* [2003] EWHC 3470 (Comm), [2005] Lloyd's Rep IR 174.

²³³⁶ For example, the right of avoidance can be waived: when reinsurers practise the right of inspection provided in the policy (*Iron Trades Mutual Insurance Co Ltd v Companhia de Seguros Imperio* [1992] ReLR), when insurers request steps from the assured which prepare for payment (*Svenska Handelsbanken v Sun Alliance and London Insurance Plc* [1996] 1 Lloyd's Rep 519); Compare with *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Grecia Express)* [2002] EWHC 203 (Comm), [2002] Lloyd's Rep IR 669 (Colman J), where insurers were not denied from the right to avoid as they placed the

The issue of losing the right to avoid when insurers do not return premiums without fraud was raised in *Argo Systems FZE v Liberty Insurance Pte Ltd (The Copa Casino)*²³³⁷ which suggests that not returning the premiums as it should after avoidance, can be considered for deciding if there was an implied waiver or not by the insurer to their right to avoid. In the case, the insurers in their defence claimed that there was a breach of warranty and a material misrepresentation by the assured entitling them to avoid the policy or alternatively entitled them to damages according to section 2 (1) of the Misrepresentation Act 1967. However, the premiums were not returned to the assured even after seven years, and insurers refused to pay but did not avoid the policy. It was held at first instance that even though there was a breach of warranty, the insurers had waived their right to rely on it and were estopped from that.²³³⁸ Also, the right to avoid was lost and the insurer had chosen affirming the contract (waiver by implied affirmation).²³³⁹ The fact that the premiums (which were of a substantial amount) were not returned in a deliberate manner even after seven years is an important factor, although not decisive.²³⁴⁰ Also, the length of silence (seven years) without purporting to avoid

assured in a position to prove his loss. It was submitted that there was no unequivocal representation by the insurer to the assured that he will not insist on his right to avoid and the contractual right to request information or documents was ancillary in its nature. To consider waiver by affirmation the contractual right must be of substantive nature, e.g. collecting premium, and must be unequivocal.

²³³⁷ [2011] EWHC 301 (Comm), [2011] 2 Lloyd's Rep 61, [2011] EWCA Civ 1572, [2012] 1 Lloyd's Rep 129.

²³³⁸ *Argo Systems FZE v Liberty Insurance Pte Ltd (The Copa Casino)* [2011] EWHC 301 (Comm), [2011] 2 Lloyd's Rep 61 [24]-[36].

²³³⁹ *Argo Systems FZE v Liberty Insurance Pte Ltd (The Copa Casino)* [2011] EWHC 301 (Comm), [2011] 2 Lloyd's Rep 61 [41].

²³⁴⁰ *Ibid* [41].

was significant to suggest that insurers chose to affirm the policy, and the letter sent by the insurers did not refer to avoidance.²³⁴¹ For the claim of damages, the court indicated that even claiming damages under the Misrepresentation Act 1967 can be possible, the matter of awarding them when the right to avoid is lost needs more detailed consideration which suitably can be done by the Court of Appeal.²³⁴² Therefore, the judge had to decide on the facts that as even damages can be a possible claim for the insurer, as the right to avoid is lost, damages cannot be awarded to the insurer, similar to the benefit that he could have gained from avoidance.²³⁴³ Nonetheless, on appeal the main question was if insurers were estopped from relying on the breach of warranty, because of the silence of seven years and the representation in the letter, and the decision was that insurers were not estopped, as there was no unequivocal representation.²³⁴⁴ The issue of returning premiums was not discussed as once there is a breach of warranty, the premiums will not be returned.²³⁴⁵ Also damages for misrepresentation was not discussed either.²³⁴⁶

²³⁴¹ Ibid [41].

²³⁴² *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep IR 191.

²³⁴³ *Argo Systems FZE v Liberty Insurance Pte Ltd (The Copa Casino)* [2011] EWHC 301 (Comm), [2011] 2 Lloyd's Rep 61 [46].

²³⁴⁴ *Argo Systems FZE v Liberty Insurance Pte Ltd (The Copa Casino)* [2011] EWCA Civ 1572 (Comm), [2012] 1 Lloyd's Rep 129 [43]-[52].

²³⁴⁵ *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 AC 233.

²³⁴⁶ *Argo Systems FZE v Liberty Insurance Pte Ltd (The Copa Casino)* [2011] EWCA Civ 1572 (Comm), [2012] 1 Lloyd's Rep 129.

On the other hand, if the insurer has actually asserted avoidance, waiver by affirmation or estoppel may still be found if his later communication with the assured was equivocal.²³⁴⁷ That will be the case when the insurer after asserting to avoid: continues to collect premiums, performs his duties under the contract, or corresponds with the assured revealing a non-finalised decision.²³⁴⁸ It must be noted that the standard in the latter case is an objective indication of the non-finalised decision, and therefore the subjective intentions of the insurer to review the decision later without any objective indication may not be waiver.²³⁴⁹ Nonetheless, the reinstatement of the policy cannot be assumed even after the insurer's assertion of avoidance and his later ambiguous conduct which can give the impression that the decision is still under consideration and may raise waiver, as the reinstatement of the policy needs to be clearly indicated by the insurer in order to take place.²³⁵⁰

Delay in communication by the insurer to the assured can be a ground for inferring waiver especially if it was associated with an act leading the assured to believe that the insurer will pay the claim²³⁵¹, and here courts usually support the assured in finding waiver unless the insurer makes steps which clearly illustrate that he wants to insist on his rights.²³⁵² However, that does not mean that every delay is considered an implied waiver whether such steps

²³⁴⁷ *Drake Insurance Co v Provident Insurance Co* [2003] EWCA Civ 1834, [2004] Lloyd's Rep IR 277.

²³⁴⁸ *Ibid.*

²³⁴⁹ *Ibid.*

²³⁵⁰ *Ibid.*

²³⁵¹ *Simon Haynes, Barlas & Ireland v Beer* (1945) 78 Ll L Rep 337; *Simner v New India Assurance Co Ltd* [1995] LRLR 240.

²³⁵² *Nicholson v Power* (1869) 20 LT 580; *Barber v Imperio Reinsurance Co (UK) Ltd* (CA, 15 July 1993).

existed or not, as the insurers have the right of reasonable time for election.²³⁵³

As stated above, one of the conditions for finding implied waiver by affirmation was whether a reasonable person in the same position of the actual assured would have been induced by the insurer's conduct or words to believe that the insurer had elected to affirm the contract.²³⁵⁴ Therefore, there will be no case of waiver if the assured knows that the insurer's conduct or words were with absence of knowledge of important material facts.²³⁵⁵ However, there is uncertainty surrounding the test above: does it mean whether a reasonable person who would be in the same position of the actual assured appreciates that an informed election was made by insurers²³⁵⁶ or the effect of the conduct of the insurer on the actual assured?²³⁵⁷ The former test seem to be of importance in fraud where the assured will try to hide his fraudulent

²³⁵³ For example , it was held that five days of silence by the insurers without prejudice to the assured does not infer an implied waiver by affirmation (*McCormick v National Motor & Accident Insurance Union* (1934) 40 Com Cas 76 [81]–[82]) ; See also : *Simon Haynes, Barlas & Ireland v Beer* (1945) 78 LIL Rep 337; *Allen v Robles* [1969] 1 WLR 1193 [1196] (Atkinson LJ) , where it was stated that delay will not be considered a waiver unless there is a prejudice to the assured, or the existence of a third party right or if it is very lengthy in the view of the court ; *Orakpo v Barclays Insurance Services Co Ltd* [1995] LRLR 443; *Callaghan & Hedges (t/a Stage 3 Discotheque) v Thompson* [2000] Lloyd's Rep IR 125; *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 1705 (Comm), [2011] Lloyd's Rep IR 101 .

²³⁵⁴ *Insurance Corp of the Channel Islands v Royal Hotel Ltd* [1998] Lloyd's Rep IR 151.

²³⁵⁵ *Callaghan & Hedges (t/a Stage 3 Discotheque) v Thompson* [2000] Lloyd's Rep IR 125.

²³⁵⁶ *Insurance Corp of the Channel Islands v Royal Hotel Ltd* [1998] Lloyd's Rep IR 151; See *Spriggs v Wessington Court School* [2004] EWHC 1432 (QB), [2005] Lloyd's Rep IR 474, where the court preferred such test because of its objectivity as subjectivity is not a standard to decide on the continuity or the end of the contract.

²³⁵⁷ *Callaghan & Hedges (t/a Stage 3 Discotheque) v Thompson* [2000] Lloyd's Rep IR 125.

behaviour, and thus waiver cannot be inferred except when it is clear from the insurer's conduct or words that he knew about fraud and elected to waive his right.²³⁵⁸

Another condition of implied waiver by affirmation is the insurer's knowledge to the breach of the assured and to his right to avoid.²³⁵⁹ The principle is that actual knowledge of the insurer is required as constructive knowledge is not enough.²³⁶⁰ Nonetheless, there are cases where a lower level of knowledge is acceptable, and that would particularly be when the insurer had prior knowledge of the assured's breach in another context.²³⁶¹ It must be noted that when the insurer waives his right to avoid while he is aware of a certain breach by the assured, that does not mean he will be denied the right to avoid when other breaches appear after waiver.²³⁶² The insurer's lawyer knowledge of breach will be considered as the knowledge of the insurer himself in respect of waiver,²³⁶³ and the same will be applied to the

²³⁵⁸ *Baghbadrani v Commercial Union Assurance Co Plc* [2000] Lloyds Rep IR 94.

²³⁵⁹ The knowledge of the right to avoid besides the assureds' breach was not conclusive in the *Pan Atlantic Insurance Co v Pine Top Insurance Co Ltd* [1992] 1 Lloyd's Rep 101; however it was clear in *Insurance Corporation of the Channel Islands v Royal Hotel* [1998] Lloyd's Rep IR 151.

²³⁶⁰ *Laing v Union Marine Insurance Co Ltd* (1895) 1 Com Cas 11; *Evans v Bartlam* [1937] AC 473.

²³⁶¹ See *Insurance Corp of the Channel Islands v Royal* [1998] Lloyd's Rep IR 151 ; *Kingscroft Insurance Co Ltd & Ors v Nissan Fire & Marine Insurance Co Ltd (No2)* [1999] Lloyd's Rep IR 603; Compare with *Mahli v Abbey Life Assurance Co* [1996] LRLR 237, where that was not the case.

²³⁶² See *Spriggs v Wessington Court School* [2004] EWHC 1432 (QB), [2005] Lloyd's Rep IR 474, where insurers were entitled to avoid the policy following the appearance of other non-disclosed instances of abuse, even though they have waived their right to avoid by affirmation previously with knowledge of non-disclosed abuse claims against the students by the headmaster.

²³⁶³ *Insurance Corp of the Channel Islands v Royal Hotel* [1998] Lloyd's Rep IR 151; *Moore Large & Co Ltd v Hermes Credit & Guarantee Plc* [2003] EWHC 26 (Comm), [2003] Lloyd's Rep IR 315.

insurer's agent knowledge.²³⁶⁴

In respect of waiver by estoppel it can be imagined in the insurance context where the insurer makes a statement indicating payment which results in costs borne by the assured; however, there seem to be no successful claims as such until now.²³⁶⁵ It must be noted that promissory estoppel as in the example above which relies on the insurer's promise of future conduct is effective only when the assured acts in an 'equitable' manner, and therefore any deliberate fraud by the assured in the risk presentation will rip him off from any chance of claiming such type of estoppel.²³⁶⁶ Convention estoppel and issue estoppel can be also possible. For the former, the parties of the contract consider that the contract is valid and act on that basis, and there is no requirement of any representation, as a shared mistake in assuming the validity of the contract can be sufficient.²³⁶⁷ For the latter, it appears when in the course of a legal proceeding a certain matter is raised making it impossible to be discussed again in subsequent proceedings.²³⁶⁸

²³⁶⁴ See Ch 6 for detailed discussion.

²³⁶⁵ See *Orakpo v Barclays Insurance Services Co Ltd* [1995] LRLR 443 ; *Insurance Corp of the Channel Islands Ltd v McHugh* [1997] LRLR 94 ; In both cases the condition of the unequivocal communication by the insurers was missing ; *Callaghan & Hedges(t/a Stage 3 Discotheque) v Thompson* [2000] Lloyd's Rep IR 125.

²³⁶⁶ *Callaghan & Hedges (t/a Stage 3 Discotheque) v Thompson* [2000] Lloyd's Rep IR 125 ; *Baghbadrani v Commercial Union Assurance Co Plc* [2000] Lloyd's Rep IR 94; *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 1705 (Comm), [2011] Lloyd's Rep IR 101.

²³⁶⁷ *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84.

²³⁶⁸ See *Insurance Corp of the Channel Islands v Royal Hotel* [1998] Lloyd's Rep IR 151, where insurers were denied from discussing the validity of a material damage policy since the issue was not raised in the arbitration proceedings which were before the present judicial proceedings.

When insurers waive their right to avoid or lose it by the operation of law, it seems that damages can be a possible remedy for them as indicated in *Argo Systems FZE v Liberty Insurance Pte Ltd (The Copa Casino)*.²³⁶⁹ It must be also noted that even though it is settled that insurers cannot reject a claim and affirm the policy,²³⁷⁰ it seems that it is possible for the parties to include a contractual term excluding the insurers' right to avoid and providing them with damages instead, in case of the assured's breach of the duty of utmost good faith.²³⁷¹ It is also possible for the parties to include an express contractual term that in the case of losing the right to avoid, the insurers will have the right to come after any person in the organisation of the assured pleading guilty of the fraud that caused the loss.²³⁷² However, the idea of having an implied right of damages instead of avoidance, where it is agreed that the insurer's right to avoid is excluded is clearly rejected.²³⁷³

²³⁶⁹ [2011] EWHC 301 (Comm), [2011] 2 Lloyd's Rep 61 [46].

²³⁷⁰ *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581 (The remedy is all or nothing remedy).

²³⁷¹ R. Merkin, *Colinvaux's Law of Insurance* (9th edn, Sweet and Maxwell 2010) para 6-100; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 3 All ER 581.

²³⁷² *Kumar v AGF Insurance Ltd* [1998] 4 All ER 788.

²³⁷³ *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] Lloyd's Rep IR 191, [2001] Lloyd's Rep IR 702; See also *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] QB 665, where its approach in rejecting damages was followed in the former case.

7.2.2 Remedies For Post-Contractual Breach Of The Duty Of Good Faith

As discussed earlier in chapter 5, the remedy for breaching the post-contractual good faith generally²³⁷⁴ is avoidance *ab initio*.²³⁷⁵ That is evident from the *Star Sea*²³⁷⁶ where it was indicated that the availability of such remedy as the only remedy which is not beneficial to the assured in case of the insurer's breach is an indicator of the limited application of the continuing duty of good faith. The approach was then confirmed by the *Aegeon*²³⁷⁷ which tried to soften the position and viewed that avoidance *ab initio* is available only when there is a serious contractual breach for non-disclosure or misrepresentation of material information (assuming that it is fraudulent) inducing to enter the contract, and it will be an additional remedy option to the repudiation due to the contractual breach. It must be noted that the suggestion to award damages in case of breaching the duty of good faith was refused.²³⁷⁸ Such harsh disproportionate remedy made courts reluctant to label the post-contractual duty

²³⁷⁴ See Ch 5, under 5.9 for more explanation about the incidents of the general post-contractual good faith in detail ; it must be noted that other incidents which can be classified as attaching post-contractual duty of good faith were mentioned in *the K/S Merc-Skandia XXXXII v Certain Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802.e.g. variation clauses, however, Longmore LJ viewed them more of pre-contractual duties; See Ch 5, under 5.9 for details on those incidents and their remedies.

²³⁷⁵ See Ch 5, under 5.9 for more details on the remedies of post-contractual good faith.

²³⁷⁶ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1997] 1 Lloyd's Rep 360, [2001] UKHL 1, [2003] 1 AC 469.

²³⁷⁷ *Agapitos v Agnew (The Aegeon) (No 1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573.

²³⁷⁸ *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947.

as exactly as the one embedded in the MIA1906 to avoid the harshness of the remedy, e.g. they tried to classify it as an implied term in the contract to incur damages.²³⁷⁹

As mentioned earlier, in the draft clauses of the Insurance Contract Law Draft Bill issued recently by the Law Commissions,²³⁸⁰ the remedy of avoidance based on the duty of good faith is abolished, and therefore parties will no longer be allowed to avoid the contract based

²³⁷⁹ See Ch 5 under 5.9 ; *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 54, [2006] 1 Lloyd's Rep 566 (The duty to disclose documents by the assured's brokers to the underwriters after the contract was made was classified as a contractual duty (implied term in the contract giving the assured's brokers such authority based on market practice and the assured's utmost good faith) rather than a post-contractual duty of good faith, even though it was admitted the contractual duty was enlightened by the duty of good faith) ; *Horwood & Ors v Land of Leather Ltd* [2010] EWHC 546 (Comm), [2010] Lloyd's Rep IR 453 (It was found that there is an implied term in the contract that an assured must act in good faith regards the insurer's interests and subrogation rights in a liability insurance policy); *Gan Insurance Co v Tai Ping Insurance Co (No2)* [2001] EWCA Civ 1047, [2000] Lloyd's Rep IR 667 (Mance L J) where the obligation of the insurer to consider the assured's interests when negotiating with third parties was classified a contractual obligation rather than a post-contractual duty of good faith ; *Bonner v Cox Dedicated Corporate Member Ltd* [2005] EWCA Civ 1512, [2006] Lloyd's Rep IR 385 (where it was noted by Waller LJ that duty of good faith is only pre-contractual and after the contract every obligation will be contractual by implied or express terms. In other words, the post-contractual duty of good faith is more of something effecting the contractual obligation, not an obligation itself with its own remedies); see also *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834, [2004] Lloyd's Rep IR 277 (It was noted that insurers can be in breach of post-contractual good faith to avoid the contract because of non-disclosure of the speeding conviction while it would make no difference to the premium. However, the court's main justification for denying the insurer's right to avoid was inducement as insurers failed to prove that they were induced by the speeding conviction) ; See O. Gürses 'Post-Contractual Duty Of Good Faith – English Position' a (Insurance Gangnam Style - An insurance master class, Perth , 17 May 2013) found in <<http://www.aila.com.au/docs/default-source/speaker-papers/insurance-gangnam-style---dr-ozlem-gurses---post-contractual-ugf-paper.pdf?sfvrsn=4>> accessed 12 Nov 2013.

²³⁸⁰ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

on the principle of good faith.²³⁸¹ As a result, section 17 of the MIA1906 will be modified as the remedy of avoidance will be removed, while it will still state that insurance is a contract of utmost good faith.²³⁸² It must be noted that such a result will not be limited to non-consumer insurance. It will also apply to the breach of the post-contractual of good faith in consumer insurance, as the CIA2012 which abolishes the duty of disclosure and good faith, and removes any rule of law relating to section 17 of the MIA1906, amends the common law and the MIA1906 regards the pre-contractual period only.²³⁸³ For the post-contractual period, the MIA1906, and the common law principles will still apply.²³⁸⁴

Fraudulent claims and the duty of good faith are now treated as separate issues according to current case law and the remedy for the fraudulent claim will be the forfeiture of the fraudulent claim, and not avoidance *ab initio*.²³⁸⁵ The Law reforms suggest making the duty to refrain from a fraudulent claim a statutory duty, and provide the forfeiture of the fraudulent claim as a remedy in case of the assured's breach, with the possibility of paying damages against expenses borne by the insurer for fraud investigation.²³⁸⁶ The draft clauses of the

²³⁸¹ Insurance Contract Law Draft Bill, cl 14.

²³⁸² Ibid, cl 14(3).

²³⁸³ R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-002A.

²³⁸⁴ Ibid.

²³⁸⁵ See Chapter 5 under 5.9, and below for more details ; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [1997] 1 Lloyd's Rep 360, [2001] UKHL 1, [2003] 1 AC 469 ; *Agapitos v Agnew (The Aegeon) (No 1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573 ; *K/S Merc-Skandia XXXXII v Certain Lloyd's Underwriters (The Mercandian Continent)* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802.

²³⁸⁶ See below for more detailed analysis; see LCCP2011.

Insurance Contract Law Draft Bill issued recently by the Law Commissions²³⁸⁷ incorporated most of the proposals except paying fraud investigations costs, and these will be considered in detail in the next sections.²³⁸⁸

The insurer's delay to the payment of the claim even can be considered theoretically as a breach of the continuing duty of good faith;²³⁸⁹ however, as the only remedy is avoidance *ab initio*, and damages are refused²³⁹⁰ that will not be beneficial to the assured.²³⁹¹ Currently the assured can claim only the original amount of the claim plus interest, but not damages based on the hold harmless principle and that damages are not payable for damages.²³⁹² The Law Commissions' reforms suggest characterising the insurer's duty to be to pay a valid claim in a reasonable time instead of to hold harmless, incurring damages in case of breach.²³⁹³ The draft clauses of the Insurance Contract Law Draft Bill issued recently by the

²³⁸⁷ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm> > accessed in 28 March 2014.

²³⁸⁸ See below.

²³⁸⁹ MIA1906, s 17; *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 (Clyde L) where it was stated that the duty of good faith is flexible and changeable.

²³⁹⁰ MIA1906, s17 ; *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947.

²³⁹¹ See below for detailed analysis ; see LCCP2011.

²³⁹² *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep IR 111 ; See also : *Apostolos Konstantine Ventouris v Trevor Rex Mountain (The Italia Express (No 3))* [1992] 2 Lloyd's Rep 281 ; *The President of India v Lips Maritime Corporation (The Lips)* [1988] AC 395 (Brandon L) [425].

²³⁹³ See below for more detailed analysis and other possible remedies and solutions; See LCCP2011 para 5.5-5.26.

Law Commissions²³⁹⁴ made some changes to the proposals which will be considered in detail in the next sections.²³⁹⁵

In liability insurance, the insurer owes a duty of good faith in negotiations to the assured as an implied term where its breach may incur damages.²³⁹⁶ However, having a general effect of such approach to other kinds of insurance is not clear, but it can be said that the insurer now does not have complete discretion when handling claims.²³⁹⁷ As indicated in chapter 5, the

²³⁹⁴ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm> > accessed in 28 March 2014.

²³⁹⁵ See below.

²³⁹⁶ See Ch 5 under 5.9 ; *Groom v Crocker* [1939] 1 KB 194 ; *K/S Merc-Skandia XXXXII v Certain Lloyd Underwriters* [2001] EWCA Civ 1275, [2001] Lloyd's Rep IR 802.

²³⁹⁷ Ibid ; *Insurance Corporation of the Channel Islands Ltd v McHugh* [1997] LRLR 94 (Mance J), where it was held that the continuing duty of the insurer does not incur an implied term to negotiate the claims and pay them in good faith and without delay , *Gan Insurance Co Ltd v Tai Ping (No 2)* [2001] EWCA Civ 1047, [2001] Lloyd's Rep IR 667, where it was held that there is no duty on the reinsurer for reasonable actions regarding deciding on accepting a settlement by the reassured. He has a duty only to refrain from irrational actions when deciding, e.g. considering unconnected circumstances ; See *Eagle Star Insurance Co Ltd v Cresswell* [2004] EWCA Civ 602, [2004] Lloyd's Rep IR 537 (Rix J) , where it was viewed by Rix J that a restriction, which comes from the post-contractual duty of good faith or an implied term in the contract making the insurer refrain from considering unconnected circumstances to the claim will be applied on the discretion of the reinsurer in his decision on controlling a claim against the reassured which is a condition precedent for the coverage ; See also: *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] Lloyd's Rep IR 764, where Rix J in his dissenting view, viewed that in case of waiver by the insurer in respect of relevant information, avoidance of the policy will be regarded a breach of the insurer's good faith as waiver is based on fairness, but the majority's view was that reinsurers will have the right to depend on the information "as it appears of face on things". However, the dissenting view indicates a beginning of change towards having more of a general effect to the insurer's good faith when dealing with the assured (See below under 5.10 on waiver;

FCA rules embedded in the ICOBS contain binding guidelines on claims handling which apply to insurers and intermediaries carrying out non-investment insurance.²³⁹⁸ However, as mentioned above in the pre-contractual remedies, the breach of the FCA rules gives the right for a disciplinary action against the insurer by the FCA that will not benefit the assured.²³⁹⁹ Further, it can give the right for damages for the assured under section 150 of the FSMA2000 which is now replaced by section 138 D of the Financial Services Act 2012,²⁴⁰⁰ provided that the claimant is a 'private person'.²⁴⁰¹ The author discussed earlier that such a right is rarely pursued by consumers,²⁴⁰² who prefer to resort to the FOS, which can grant them damages in a cheap and effective way, instead of raising the matter in courts which can be expensive, long, and uncertain.²⁴⁰³

Ch 7 under loss of right to avoid for more); See *Diab v Regent Insurance Co Ltd* [2006] UKPC 29, [2006] Lloyd's Rep IR 779, it was found that there is no continuing duty of good faith on the insurers to alert the assured to fulfil the conditions of the claims. However, such duty or an implied term can be possible on the insurers regard a contract term giving them the right for offering more time for fulfilment; See *Quinn Direct Insurance Ltd v The Law Society of England and Wales* [2009] EWHC 2588 (Ch), [2010] Lloyd's Rep IR 336 [2010] EWCA Civ 647, [2010] Lloyd's Rep IR 655 (Insurers' unreasonable requests for documents needed for a claim were not allowed).

²³⁹⁸ See ICOBS 8.1.1. ; See Ch 5 under 5.9 for more detailed explanation on the rule.

²³⁹⁹ FSMA 2000, s 66.

²⁴⁰⁰ Financial Services Act 2012, sch18, prt 1, s 12.

²⁴⁰¹ FSMA 2000 (Rights of Action) Regulations 2001, SI 2001/2256, reg 3.

²⁴⁰² See above under 7.2.1; Only few reported cases can be found e.g. *Spreadex Ltd v Sekhon* [2008] EWHC 1136 (Ch), [2009] 1 BCLC 102.

²⁴⁰³ Ibid; IP6 paras 5.16–5.19; LCCP 2011 paras 3.19–3.26.

Other breaches of good faith by the insurer can include exercising the right to avoid in bad faith and the remedy seems to be restricting the insurer from the right to avoid.²⁴⁰⁴ The FCA rules stated earlier can provide a remedy as well since such approach by the insurer can be a breach to its guidelines.²⁴⁰⁵

Since the remedies when breaching the general post-contractual duty of good faith were discussed in detail earlier in chapter 5,²⁴⁰⁶ the discussion in this section will stress the remedies for late payments of the claim by the insurers and fraudulent claims by the assured and the proposed reforms.

I Damages For late Payment of the Claim?

1. The Present Situation:

In English general contract law if one of the parties breaches his obligations, the other party can claim damages provided that there is an actual financial loss which is foreseeable when entering the contract and there are reasonable steps to reduce the loss.²⁴⁰⁷ Nonetheless, the

²⁴⁰⁴ *Drake Insurance Plc v Provident Insurance Plc* [2003] EWCA Civ 1834, [2004] Lloyd's Rep IR 277 ; See Ch 5 under 5.9 for more .

²⁴⁰⁵ See ICOBS 8.1.1. , where it was stated that insurers must handle the claims fairly and not unreasonably reject the claim by the way of avoidance of the policy.

²⁴⁰⁶ See Ch 5 under 5.9.

²⁴⁰⁷ *Hadley v Baxendale* (1854) 9 Ex 341; The court set that losses are from two types: the first type are losses which can be considered in a reasonable manner as a natural result , and the other type are losses which occur because of special circumstances which are communicated at the time of the contract ; *Robinson v Harman* (1848) 1 Ex Rep 850 ; See *Transfield Shipping Inc of Panama v Mercator Shipping Inc of Monrovia (The*

situation is different in insurance law.²⁴⁰⁸ If an insurer refuses to pay a valid claim, or pays with delay, the insured can only claim the original amount owed plus interest, and cannot claim damages resulting from such conduct.²⁴⁰⁹ The leading case behind establishing this position is *Sprung v Royal Insurance (UK) Ltd*.²⁴¹⁰ In this case, Mr Sprung was denied payment for the loss he suffered as a result of the delay by the insurer to pay his claim. The reason behind such an approach from English courts is based on the fact that the contract of insurance is an obligation on the insurer to ‘hold harmless’, i.e. to prevent the loss from occurring and not to pay the valid claim in a reasonable time.²⁴¹¹ When the insurer fails to fulfil this obligation as the harm occurs, then indemnity is payable.²⁴¹² If the insurer delays or refuses to pay a valid claim, he will be required to pay the indemnity amount plus interest, but not losses suffered by the insured resulting from such a refusal or delay in paying the

Achilleas) [2008] UKHL 48; [2009] 1 AC 61, for the application of the rule in the commercial context where commercial practice should be considered and the amount will be confined to the duty to reduce the loss.

²⁴⁰⁸ See below.

²⁴⁰⁹ *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep IR 111.

²⁴¹⁰ [1999] 1 LRIR 1 1 1.

²⁴¹¹ *Firma C-Trade SA v Newcastle Protection and Indemnity Association (London) Ltd (The Fanti)*; *Socony Mobil Oil Inc v West of England Shipowners Mutual Insurance Association (The Padre Island)* [1991] 2 AC 1 [35]-[36] (Goff L) ; *Apostolos Konstantine Ventouris v Trevor Rex Mountain (The Italia Express (No 3))* [1992] 2 Lloyd's Rep 281; *Transthene Packaging Co Ltd v Royal Insurance (UK) Ltd* [1996] Lloyds' Rep IR 32 [40].

²⁴¹² *Ibid.*

indemnity amount.²⁴¹³ That is because insurance claim payments are treated as damages for breaching the contract, and not as debts owed by the insurer, therefore it was established that English law does not grant the right for paying damages for damages.²⁴¹⁴ This rule has exceptions as it is not applied against brokers,²⁴¹⁵ in life policies²⁴¹⁶ or in reinstatement policies.²⁴¹⁷ *Sprung*, which left open the possibility of incurring damages by an express term in the policy for breaching the claim payment within a reasonable time,²⁴¹⁸ was applied to subsequent cases which tried to find damages but did not succeed.²⁴¹⁹ Some of the failed

²⁴¹³ *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep IR 111 ; *Apostolos Konstantine Ventouris v Trevor Rex Mountain (The Italia Express (No 3))* [1992] 2 Lloyd's Rep 281 ; *The President of India v Lips Maritime Corporation (The Lips)* [1988] AC 395 [422]- [425] (Brandon L).

²⁴¹⁴ Ibid; *Sprung* case has raised a lot of academic criticisms, see: J. Birds, 'Case Comment: No Damages Remedy When Insurers Unjustifiably Repudiate Liability' (1997) 22 JBL 368; J. Lowry & P. Rawlings, 'Insurers, Claims and the Boundaries of Good Faith' (2005) 68 MLR 82, 85; and for comparative approach of the subject, see J. Al-Asady, 'Damages, Late Payment and Indemnity Insurance' (2006) 4 JBL 396, and C. Ying, 'Damages for Late Payment of Insurance Claims' (2006) 122 LQR 205, 208.

²⁴¹⁵ *Arbory Group v West Craven Insurance Services* [2007] Lloyd's Rep IR 491.

²⁴¹⁶ *Blackley v National Mutual Life Association Ltd (No 2)* [1973] 1 NZLR 668.

²⁴¹⁷ *Arbory Group v West Craven Insurance Services* [2007] Lloyd's Rep IR 491.

²⁴¹⁸ *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep IR 111 [116] (Evans LJ).

²⁴¹⁹ *Insurance Corp of the Channel Islands Ltd v McHugh* [1997] LRLR 94; *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481; *Mandrake v Countrywide Assured Group* [2005] EWCA Civ 840; *Normhurst Ltd v Dornoch Ltd* [2004] EWHC 567 (Comm), [2005] Lloyd's Rep IR 27; *Tonkin v UK Insurance Ltd* [2006] EWHC 1120 (TCC), [2006] 2 All ER (Comm) 550.

attempts were by classifying the duty to pay the claim within a reasonable time as an implied term.²⁴²⁰ Even when there is an express term for prompt claim payments, it seems that there is hesitance from courts towards accepting it and paying damages.²⁴²¹

2. The Case for Reform:

The Law Commissions published an Issue Paper on Damages for late payment in 2010 (IP6)²⁴²² and a Consultation Paper in 2011 (LCCP2011)²⁴²³ which considered many criticisms of the decision in *Sprung* and its basis in the hold harmless principle.²⁴²⁴ It was stated that the current situation of denying losses caused by delay causes unfairness to the insured and does not consider the commercial side of the case.²⁴²⁵ Also, it is harsh on the insured, especially if confronted with the risk of losing his business or failing to pay his debts, and he may not have the funds to reduce the loss.²⁴²⁶ Additionally, the hold harmless rule is

²⁴²⁰ *Insurance Corp of the Channel Islands Ltd v McHugh* [1997] LRLR 94 [136] (Mance J).

²⁴²¹ *Tonkin v UK Insurance Ltd* [2006] EWHC 1120 (TCC), [2006] 2 All ER (Comm) 550 ; See also *Normhurst Ltd v Dornoch Ltd* [2004] EWHC 567 (Comm) , [2005] Lloyd's Rep IR 27, where a description of the insurer's liability as a payment in the policy was not accepted as a ground to award damages.

²⁴²² The Law Commission and Scottish Law Commission, *Damages for Late Payment and the Insurer's Duty of Good Faith* (Issues Paper 6, 2010) (IP6).

²⁴²³ The Law Commission and Scottish Law Commission, *Insurance Contract Law: Post Contract Duties And Other Issues, A Joint Consultation Paper* (Law Com CP No 201, Scot Law Com DP No 152, 2011) LCCP2011.

²⁴²⁴ See below.

²⁴²⁵ IP6 paras 8.1–8.38, LCCP 2011 paras 2.14–2.54; 4.8–4.10.

²⁴²⁶ LCCP2011 4.8- 4.10.

unprincipled and differs from the law in Scotland where the insurer's duty is to pay the valid claim in a reasonable time, and therefore damages are payable for breach.²⁴²⁷

In that sense, insurance law in England is not consistent with what is applied in general contract law and it is the only exception to common law where damages are not payable if the contract obligation is breached.²⁴²⁸

Others arguments raised against the current regime are that it seems reasonable to place some responsibility on the insurer for delayed payments of claims to be at least in line with what is required from the insured, i.e. promptly notifying the insurer if the loss occurred and providing proof within a reasonable time.²⁴²⁹ It seems rather unfair to penalise the assured for delay in such circumstances, but not the insurer.²⁴³⁰ In other aspects, such an insurer-friendly approach can encourage insurer's bad faith.²⁴³¹ An insurer may procrastinate in paying a claim for a long time, knowing that the only remedy for the insured is the claim amount plus interest. Under further scrutiny of the case, it seems to be winning both ways for the insurer, bearing in mind the courts' interest rates.²⁴³² Another strong justification against the present

²⁴²⁷ *Scott Lithgow Ltd v Secretary of State for Defence* 1989 SC (HL) 9; more recently *Strachan v The Scottish Boatowners' Mutual Insurance Association* 2010 SC 367 ; IP6 2010 paras 3.1–3.21 ; LCCP2011 paras 2.62–2.87,4.6–4.8.

²⁴²⁸ *Hadley v Baxendale* (1854) 9 Ex 341; IP6 2010 paras 2.1–2.80; LCCP 2011 paras 2.6 –2.14.

²⁴²⁹ M. Clarke 'Compensation for failure to Pay Money Due: A "Blot on English Common Law Jurisprudence" ' (2008) 4 JBL 291, 298.

²⁴³⁰ Ibid.

²⁴³¹ Ibid.

²⁴³² Ibid.

situation in English courts is based on questioning the grounds of the rule in *Sprung*. The rule in *Sprung* is based on the fact that insurance contracts are contracts of indemnity. However, that is not the case with all insurance contracts, especially in life and critical illness insurance. These types of insurance are agreements to pay a certain amount when the loss occurs, and do not seek to indemnify death.²⁴³³

3. Alternative Solutions:

Even though refusing a valid claim or delaying it can be considered theoretically a breach of the insurer's continuing duty of good faith,²⁴³⁴ it is established that damages are not payable for such a breach, and the only remedy is avoidance *ab initio* which is not beneficial to the assured.²⁴³⁵ In respect of damages for distress and inconvenience, insurance law has differentiated between the situations where the insurer refuses to pay the claim at all²⁴³⁶ and the situations where the insurer has failed to reinstate the property in a proper manner,²⁴³⁷ as it

²⁴³³ It must be noted that they are considered exceptions to the general rule in *Sprung* along with claims against brokers, and where the insurer agrees to reinstate property; see above; IP6 2010 paras 8.1–8.38 ; LCCP2011 paras 2.55–2.61.

²⁴³⁴ See *Manifest Shipping & Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 (Clyde L) where it was stated that the duty of good faith is flexible and changeable.

²⁴³⁵ MIA1906, s17; *La Banque Financière de la Cité SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952, [1990] 2 All ER 947; LCCP2011 paras 3.3–318.

²⁴³⁶ *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481.

²⁴³⁷ *AXA Insurance UK Plc v Cunningham Lindsey UK* [2007] EWHC 3023 (TCC).

denied such damages for the former and permitted them in a limited fashion for the latter.²⁴³⁸ Other remedies which can be available for late payment of the claim include: interest, damages for breaching statutory duties (FCA rules embedded in ICOBS stated earlier), damages for tort of deceit, and reinstatement.²⁴³⁹ Consumer and small business assureds can also resort to the FOS, which departs from case law to avoid unfairness and awards damages for late payments of insurance claims, in addition to damages for distress and inconvenience in a limited amount. Nevertheless, such procedures are not available to consumer or small business assureds for claims above £100,000 pounds.²⁴⁴⁰ The LCCP2011 argued the need for legal reform as the alternative solutions were not enough to substitute it.²⁴⁴¹

4. Suggested Reforms:

The suggested reforms of the Law Commissions in respect of this area are laid out in the LCCP2011. The main proposed reform is to change the insurer's duty in the insurance contract to be a duty to pay a valid claim in a reasonable time.²⁴⁴² In other words, the proposal will reverse the *Sprung* rule and rearticulate the insurer's duty to be a statutory duty to pay a valid claim in a reasonable time instead to hold harmless. Damages are payable by the insurer if he fails to meet such duty according to principles of contract law, where only actual and

²⁴³⁸ It must be noted that damages for distress and inconvenience are granted in general contract law cases concerning consumers under certain conditions; See *Milner v Carnival* [2010] EWCA Civ 389, [2010] 3 All ER 701; LCCP2011 paras 2.72–2.80.

²⁴³⁹ IP6 paras 5.1–5.49; LCCP2011 paras 3.19–3.26.

²⁴⁴⁰ LCCP2011 paras 2.72–2.80 & 3.27–3.31.

²⁴⁴¹ LCCP2011 prt 3.

²⁴⁴² LCCP2011 para 5.9.

foreseeable damages are to be paid.²⁴⁴³ For the meaning of reasonable time, the LCCP2011 proposes that the time for the insurer to examine the claim will start from when all material information demanded is given by the assured, provided that such demands are reasonable.²⁴⁴⁴ The time must be enough and reasonable for full examination and assessment of the claim and for third party involvement in providing information if needed.²⁴⁴⁵ It must also correspond to market practice, the kind of insurance conducted, how large and convoluted is the claim, and where it takes place.²⁴⁴⁶

Awards of damages for distress and inconvenience in consumer insurance policies are also included by the LCCP2011 proposals. English courts already award damages for distress and inconvenience in consumer contract law under certain conditions,²⁴⁴⁷ and in insurance law where an insurer does not reinstate the property in a proper manner.²⁴⁴⁸ However, they do not award such damages for insurers' failure to pay a valid claim promptly.²⁴⁴⁹ In contrast, the FOS does not draw this distinction and awards damages in all those situations.²⁴⁵⁰

²⁴⁴³ Ibid.

²⁴⁴⁴ Ibid para 5.14.

²⁴⁴⁵ Ibid.

²⁴⁴⁶ Ibid.

²⁴⁴⁷ *Milner v Carnival* [2010] EWCA Civ 389, [2010] 3 All ER 701.

²⁴⁴⁸ *AXA Insurance UK Plc v Cunningham Lindsey UK* [2007] EWHC 3023 (TCC).

²⁴⁴⁹ *England v Guardian Insurance Ltd* [1999] 2 All ER (Comm) 481.

²⁴⁵⁰ LCCP2011 para 5.50-5.51 ; However the FOS has limitations as it cannot view claims above 100,000 pounds or claims against third parties. Also the different approach of the FOS gives it an unsuitable regulatory role and creates complexity between its approach and the law.

Accordingly, a reform could unify the different approaches taken by the courts and the FOS, as divergence in that matter is not favourable.²⁴⁵¹ Furthermore, the reform will correspond to consumer contract law, which should have included insurance contracts since it provides that distress damages are payable if a service has been sold for peace of mind, and the consumer suffered distress or inconvenience, and that applies to insurance.²⁴⁵²

The LCCP2011 suggests that damages paid by insurers in breach of their duty to pay a valid claim in a reasonable time can be excluded or limited in business insurance by a contractual term to maintain the freedom of business.²⁴⁵³ Nonetheless, the exclusion or limitation cannot be relied on if the insurer delays or refuses the claim in bad faith and it only applies if it is used in good faith.²⁴⁵⁴ Hence, the good faith principle will act as a ‘shield’ colouring the contractual obligation and the extent of reliance on it, rather than a ‘sword’ with its own remedies which requires proposing novel action of damages for bad faith.²⁴⁵⁵ Also, if the exclusion or limitation clause is relied upon, the insurer has to provide an explanation for his delay or refusal of the claim and it will be up to courts to assess whether the insurer acted in good or bad faith when relying on the exclusion, dependent on the circumstances of each case.²⁴⁵⁶

²⁴⁵¹ Ibid 5.51.

²⁴⁵² Ibid paras 5.52–5.56; The LCCP2011 asks the consultees if it should be through a statutory reform or leave it to courts.

²⁴⁵³ Ibid 5.15-5.19.

²⁴⁵⁴ Ibid; paras 5.26- 5.33.

²⁴⁵⁵ Ibid.

²⁴⁵⁶ Ibid 5.26–5.33.

The LCCP2011 preferred not to introduce further statutory guidelines for insurers regarding handling claims in good faith, since there are already regulatory guidelines in the FCA rules.²⁴⁵⁷ Producing more guidelines would add more layers of regulation unnecessarily, which brings more complexity than clarity.²⁴⁵⁸

For consumer insurance, it was suggested that such exclusion or limitation cannot be applied, as it is probably unfair and violates the UTCCR1999 and the FCA principles.²⁴⁵⁹ Therefore it will be not be supported by the courts or the FOS.²⁴⁶⁰ The limitation for any litigation brought by the assured against the insurer's failure to pay the claim was proposed to start from the time where the insurer had a reasonable time to investigate the claim.²⁴⁶¹

The draft clauses of the Insurance Contract Law Draft Bill issued recently,²⁴⁶² have classified the duty of the insurer to pay any amounts due to the insured as regards the claim in a reasonable time under the insurance contract as an implied term in every insurance

²⁴⁵⁷ See ICOBS 8.1.1.

²⁴⁵⁸ LCCP2011 paras 5.34–5.37.

²⁴⁵⁹ Ibid paras 5.20–5.25.

²⁴⁶⁰ Ibid.

²⁴⁶¹ Ibid paras 5.38–5.48; The Limitation Act 1980 in section 5 provides that the victim has a period of six years to pursue litigation from the date of breach. The LCCP2011 discusses what is considered the date of breach: time of loss, time of breach, time of decision; *Callaghan v Dominion Insurance Co* [1997] 2 Lloyd's Rep 541.

²⁴⁶² For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

contract,²⁴⁶³ and therefore it will be an implied term in law and a contractual obligation, with remedies applicable, e.g. damages, if such term is breached.

It must be noted that such implied term will be for the benefit of the assured only and does not extend to third parties as highlighted in the explanatory notes of the draft clauses.²⁴⁶⁴ However, third parties can benefit if they were assigned to the policy (they became the assureds legally), and they can claim late payment of the insurance claim on behalf of the assured.²⁴⁶⁵ Additionally, such implied term and payment of damages will regard valid insurance claims only, and therefore fraudulent claims or claims outside the ambit of the policy are not covered.²⁴⁶⁶ Damages for breaching the implied term above will be contractual damages, and therefore they will be calculated according to *Hadley v Baxendale*²⁴⁶⁷ to compensate foreseeable and actual loss, and where there is a mitigation of such loss.²⁴⁶⁸ The

²⁴⁶³ Insurance Contract Law Draft Bill, cl 12(1).

²⁴⁶⁴ Ibid; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.7-4.9.

²⁴⁶⁵ Ibid.

²⁴⁶⁶ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.10.

²⁴⁶⁷ (1854) 9 Ex 341.

²⁴⁶⁸ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.16.

“sums” or “amounts” due to the insured will include those reached by an agreement,²⁴⁶⁹ or by a court.²⁴⁷⁰ For the meaning of reasonable time, the draft Bill provides that it is the time which is needed to make an investigation of the claim and for its evaluation.²⁴⁷¹ Determining the reasonableness of the time will rely on the related circumstances,²⁴⁷² such as the insurance type²⁴⁷³, claim size and degree of complication,²⁴⁷⁴ complying with the regulatory

²⁴⁶⁹ However, in settlement agreements, it is more likely that the assured will no longer be able to claim a late payment of the claim as such issue will probably be dealt with in the agreement in an express manner. In any case, in practice, insurance claims will be settled by a settlement contract which is pursuant to the insurance contract, and therefore it is not a settlement agreement itself. It must be noted that damages for late payments can still be payable in regard to settlement agreements if there was unreasonable delay in reaching an agreement or in paying the agreed amount. The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.10-4.14.

²⁴⁷⁰ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.10-4.14.

²⁴⁷¹ Insurance Contract Law Draft Bill, cl 12(2).

²⁴⁷² Ibid, cl 12(3) ; The examples mentioned are non-exhaustive.

²⁴⁷³ Ibid, cl 12(3)(a).

²⁴⁷⁴ Ibid, cl 12(3)(b); For example, large claims can consume more time, and the occurrence of the loss abroad can make the claim more complex to investigate and therefore consumes more time ; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.20.

requirements,²⁴⁷⁵ and circumstances which cannot be controlled by the insurer.²⁴⁷⁶ The insurer will not be considered in breach of such implied term for just not paying the claim or part of it, while being in dispute and there are reasonable justifications for such dispute over validity of the claim or part of it.²⁴⁷⁷ There must be more than just a reasonable but wrong refusal to be in breach.²⁴⁷⁸

On the other hand, the insurer's behaviour in dealing with the dispute can be considered in reaching a decision in respect if he was in breach of such implied term, and the time of breach if there was a breach.²⁴⁷⁹ The draft Bill states that the remedies for breaching the implied term in the insurance contract to pay the claim in a reasonable time such as damages, will be

²⁴⁷⁵ Ibid, cl 12(3)(c); For example FCA requirements; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.20.

²⁴⁷⁶ Ibid, cl 12(3)(d); for example, when there is necessary information which must be provided by the assured or a third party which is not provided, the insurer must not be punished; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.20.

²⁴⁷⁷ Ibid, cl 12(4)(a).

²⁴⁷⁸ Ibid.

²⁴⁷⁹ Ibid, cl 12(4)(b) ; For example, if the insurer had reasonable justifications for disputing the claim he can be in breach of the implied term to pay the claim in reasonable time if he was slow in the investigations in an unreasonable manner; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 4.24.

“additional and different” from paying the claim amount,²⁴⁸⁰ and the interest on that amount from any source, e.g. by the contract, court, etc.²⁴⁸¹

It must be noted that the contracting out of these rules by a disadvantageous term which puts the assured in a worse position than the Bill is not allowed for consumer insurance,²⁴⁸² while it is allowed in non-consumer insurance provided transparency requirements are satisfied.²⁴⁸³ However, if breaching the implied term in non-consumer insurance is deliberate or reckless, contracting out will not be allowed.²⁴⁸⁴ The breach will be deliberate or reckless if the insurer knew that he was in breach of the implied term or did not care whether he was in breach of the implied term or not.²⁴⁸⁵

In any way, rules on contracting out do not apply to settlement agreements or cancellation clauses.²⁴⁸⁶ Therefore, in consumer insurance using less favourable terms than the provisions in the Insurance Contract Law Draft Bill is allowed as the prohibition will not be

²⁴⁸⁰ Ibid, cl 12(5)(a).

²⁴⁸¹ Ibid, cl 12(5)(b).

²⁴⁸² Ibid, cl 15; See Ch 5 under 5.10 for more detailed explanation on contracting out.

²⁴⁸³ Ibid, cls 16, 17.

²⁴⁸⁴ Ibid, cls 16(2), 16(3)(b).

²⁴⁸⁵ Ibid, cl 16(5).

²⁴⁸⁶ Ibid, cls 15(4),16(6).

applicable.²⁴⁸⁷ Also, the conditions of transparency will not be needed for non-consumer insurance.²⁴⁸⁸

II Fraudulent Claims:

1. The Current Situation:

The insurance contract can stipulate express terms for the duty not to make a fraudulent claim which, if breached, can be a breach of contractual obligation, and the remedies can be subject to what is stipulated in the contract.²⁴⁸⁹ This is a method acceptable to courts as long as those terms are clearly drafted, and it is also subject to the fairness measure embedded in the UTCCR1999 in consumer contracts.²⁴⁹⁰ In any event, parties cannot exclude liability for fraud from the contract,²⁴⁹¹ even though the matter of excluding the agent's liability for fraud is still a matter of question.²⁴⁹² Insurers here can also have the right to damages for loss caused by the assured's fraudulent claim since it will be a breach of the contract, and that can include claim examination costs and interest as indicated in *Parker v National Farmers*

²⁴⁸⁷ Ibid, cl 15(4).

²⁴⁸⁸ Ibid, cl 16(6).

²⁴⁸⁹ *Insurance Corp of the Channel Islands Ltd v McHugh* 1997] LRLR 94; *Fagnoli v G A Bonus Plc* [1997] CLC 653.

²⁴⁹⁰ If the terms are not drafted clearly, the rule of *contra proferentum* applies where the interpretation which benefits the assured will be applied; G. Swaby, 'Insurance Law Reform: Deterring Fraud in the Twenty First Century' (2011) *International Journal of Law and Management* 413, 422-423.

²⁴⁹¹ There is no direct case concerning post contractual fraud, but for pre contractual period, see: *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep 61.

²⁴⁹² *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep 61.

*Union Mutual Insurance Society Ltd.*²⁴⁹³ If the express terms in the policy provide that the policy will be void or/and all benefits under it will be forfeited without further details, the courts construed avoidance to be from the date of the fraudulent claim and not *ab initio*, and therefore valid previous claims will be unaffected.²⁴⁹⁴ However, if the policy provides that avoidance for the fraudulent claim will be from the date of the policy inception, such term will be applied.²⁴⁹⁵

If the insurance contract does not stipulate express terms for fraudulent claims, the insurer can still have a remedy against such fraud from the assured. However, the nature of the remedy differs depending on the different classifications of the court to the duty not to make a fraudulent claim and case law in that area is complex and inconsistent.²⁴⁹⁶ In the past,

²⁴⁹³ [2012] EWHC 2156 (Comm), [2013] Lloyd's Rep IR 253; this is in contradiction with the old position in *London Assurance v Clare* (1937) 57 LIL Rep 254.

²⁴⁹⁴ Such terms are common in the London Market (*Britton v Royal Insurance* (1866) 4 F& F 906); *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469; *Agapitos v Agnew (The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573; *Direct Line Insurance Plc v Fox* [2009] EWHC 386 (QB), [2010] Lloyd's Rep IR 324.

²⁴⁹⁵ *Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd* [2010] EWHC 2192 (QB), [2011] Lloyd's Rep IR 238.

²⁴⁹⁶ The classifications ranged from treating the duty as an implied term (*Orakpo v Barclays Insurance Services Co Ltd* [1995] LRLR 443 [451]-[452]) where Staughton LJ doubted the remedy of avoidance, while Sir Roger supported avoidance and Hoffmann LJ supported termination for breach, or a breach of the MIA1906, s17 (*Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437), where avoidance *ab initio* is supported, or a matter of common law rule based on public policy (*Agapitos v Agnew (The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573), where the forfeiture of the fraudulent claim was supported and not avoidance *ab initio*.

insurers may avoid the policy *ab initio* since fraudulent claims can be considered a breach of the post- contractual duty of good faith owed by the assured and a breach of section 17 of the MIA1906.²⁴⁹⁷ However, this position started to change after the *Star Sea*²⁴⁹⁸ where it was viewed that the principle which must be protected is that the fraudulent assured cannot benefit from his own fraud, and contractual analysis is better to arrive to this goal.²⁴⁹⁹ This was confirmed in subsequent case law, namely: in *The Mercandian Continent*²⁵⁰⁰ and *The Aegeon*²⁵⁰¹ where it was clarified that the duty of good faith and the duty to refrain from fraudulent claims must be treated separately and that avoidance in that way cannot be a remedy for fraudulent claims. Now it can be stated that the current state of law as far as the claim is concerned is: if a claim is fraudulent, the whole claim will be forfeited including the true parts of the claim,²⁵⁰² but not all the other previous, valid, and honest claims under the policy.²⁵⁰³

²⁴⁹⁷ *Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd's Rep 437

²⁴⁹⁸ *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469

²⁴⁹⁹ *Ibid* [61] (Hobhouse L).

²⁵⁰⁰ *K/S Merc Skandia XXXXII v Certain Lloyd's Underwriters (The Mercandian Continent)* [2001] Lloyd's Rep IR 802.

²⁵⁰¹ *Agapitos v Agnew (The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573.

²⁵⁰² Such approach is believed to give a punitive element to the remedy of fraudulent claims which aims to deter fraud, and to remove the problems from determining the true or fraudulent parts of the claim, making it easier for the insurers; See J. Hjalmarsson, 'The Law on Fraudulent Insurance Claims' (2013) JBL103, 113 .

²⁵⁰³ *Axa General Insurance v Gottlieb*[2005] EWCA Civ 112, Lloyd's Rep IR 369 [132] (Mance LJ), as it was submitted that the retroactive effect depriving the benefits of the policy will begin from the loss date where the fraudulent claim has arisen, however, the assured must repay the interim payment paid in advance on the

As for concurrent and subsequent claims, they will rely mostly on what happens to the contract.²⁵⁰⁴ It must be noted that the court in *The Captain Panagos DP*²⁵⁰⁵ regarded that there is a close connection between two concurrent claims where one of them was fraudulent and the other was true, which justifies depriving the assured from recovering for any of them. The right of insurers to repudiate the contract following the discovery of the fraudulent claim depends mostly on the policy terms, but the position is not really clear as case law is not sufficient in that respect.²⁵⁰⁶ It should be mentioned that there are indications that this right will depend on the nature of the fraud in question (following general contract law) where the right to repudiate will be maintained only if the fraud is “serious”,²⁵⁰⁷ while if it is

fraudulent claim to the insurer ; See also *Fargnoli v G A Bonus Plc* [1997] CLC 653 [678] (Penrose L) where it was stated that the penalty should “*not extend beyond the offence to deprive persons of innocent benefits, or benefits otherwise free from the taint of fraud*” ; This is similar to the Australian approach, which removed avoidance as a remedy and gave the right to forfeit the fraudulent claim without the other valid previous claims (See Australian Insurance Contracts Act 1984 (Cth) , s 56).

²⁵⁰⁴ See below.

²⁵⁰⁵ *Continental Illinois National Bank & Trust Co of Chicago v Alliance Assurance Co Ltd (The Captain Panagos DP)* [1989] 1 Lloyd’s Rep 33.

²⁵⁰⁶ Common express terms in the London market can state that the policy is ‘void’ and ‘all benefits are forfeited under the policy’ but they do not give more details (*Britton v Royal Insurance* (1866) 4 F& F 906) However, courts construed avoidance in such express terms as to be from the time of the fraudulent claim if no further details are supplied (*Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469; *Agapitos v Agnew (The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd’s Rep IR 573; *Direct Line Insurance Plc v Fox* [2009] EWHC 386 (QB), [2010] Lloyd’s Rep IR 324) ; However, if the policy provides clearly that the insurers can avoid *ab initio*, that will be applied (*Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd* [2011] Lloyd’s Rep IR 238); J. Hjalmarsson, ‘The Law on Fraudulent Insurance Claims’ (2013) JBL103, 114 ; R. Merkin, *Colinvaux’s Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 9-033.

²⁵⁰⁷ Examples include causing the loss by the assured, and exaggerated claims.

“less serious” ,²⁵⁰⁸ the insurer will be only allowed for a denial of the claim.²⁵⁰⁹ It seems that the most favourable approach by courts is the suggestion of considering the fraudulent claim a repudiatory breach of the contract entitling the termination of the policy according to the general contractual principles.²⁵¹⁰ Therefore the contract will remain and claims must be paid until the insurer elects to terminate the contract.²⁵¹¹

The application of these rules on fraudulent claims consists of some limits. Firstly, it will be limited to the time prior to the commencement of litigation, as if the litigation commences, the procedural rules will be applied instead, which is the same limit on the general post-contractual duty of good faith.²⁵¹² Also, it must be noted that the settlement agreements

²⁵⁰⁸ Examples include having a true claim supported by fraudulent devices.

²⁵⁰⁹ *Agapitos v Agnew (The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd’s Rep IR 573 (Mance LJ); See also *Royal Boskalis Westminster NV v Mountain* [1997] LRLR523 (Rix J). It must be noted that the right to repudiate the contract following the fraudulent claim is only important in some situations including: when there are true claims which are subsequent to the fraudulent claim, and when the discovery of fraud takes place before the policy ends (*Axa General Insurance v Gottlieb* [2005] EWCA Civ 112, Lloyd’s Rep IR 369) . The past position as indicated earlier is that the contract will be avoided *ab initio* since the fraudulent claim was regarded a breach of the post-contractual good faith (*Black King Shipping Corp v Massie (The Litsion Pride)* [1985] 1 Lloyd’s Rep 437) ; however, after *The Aegeon* , it was confirmed that such remedy no longer applies and that fraudulent claims are to be separated from the post-contractual good faith.

²⁵¹⁰ *Axa General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112, [2005] 1 All ER (Comm) 445 [22] (Mance LJ) ; that seems to be applied in Scotland as well (*Fargnoli v GA Bonus Plc* 1997 SCLR 12 [22] (Penrose L)).

²⁵¹¹ *Ibid.*

²⁵¹² *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469; *Agapitos v Agnew (The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd’s Rep IR 573.

between the assured and the insurer will have the same impact.²⁵¹³ Another limit seem to be insurance contracts: the rules on fraudulent claims will be applied to fraudulent insurance claims only but no other fraudulent claims.²⁵¹⁴ The suggestion not to apply the rules on fraudulent claims when fraud is retracted²⁵¹⁵ was rejected,²⁵¹⁶ and therefore retraction of fraud does not prevent the application of the fraudulent claims' rules.

2. Suggested Reforms:

There is complexity in the law regarding fraudulent claims as seen earlier, as even fraudulent claims can be apparently included in section 17 of the MIA1906 which grants avoidance *ab initio* as a remedy; common law takes another approach and treats fraudulent claims separately from good faith providing the forfeiture of the fraudulent claim as a remedy.²⁵¹⁷ This led the Law Commissions to propose reforms in the area to clarify the position, and therefore published an Issue Paper on fraudulent claims (IP7)²⁵¹⁸ and a Consultation Paper

²⁵¹³ *Direct Line Insurance Plc v Fox* [2009] EWHC 386 (QB), [2010] Lloyd's Rep IR 324.

²⁵¹⁴ *Shah v Ul-Haq* [2009] EWCA Civ 542, [2010] 1 WLR 616.

²⁵¹⁵ See D. Thomas, 'Fraudulent Insurance Claims: Definition, Consequences and Limitations' [2006] LMCLQ 485, 496.

²⁵¹⁶ *Direct Line Insurance Plc v Fox* [2009] EWHC 386 (QB), [2010] Lloyd's Rep IR 324.

²⁵¹⁷ See above.

²⁵¹⁸ The Law Commissions and Scottish Law Commission, *Reforming Insurance Contract Law: The Insured's Post-Contract Duty of Good Faith* (Issue Paper 7, 2010) (IP7), for more see G. Swaby, 'Insurance Law Reform: Deterring Fraud In The Twenty-First Century' (2011) 53 (6) International Journal of Law and Management 413, 427 .

(LCCP2011), and recently introduced draft clauses for the forthcoming Insurance Contract Law Draft Bill.²⁵¹⁹

The LCCP2011 highlights that section 17 of the MIA1906 will not apply to fraudulent claims, even though it can remain as a general principle not providing specific remedies, as suitable specific remedies must be set out for fraudulent claims.²⁵²⁰ Thus, the LCCP2011 aims to make a statutory effect to the common law position regarding the remedies of fraudulent claims and proposes that when the assured makes a fraudulent claim, the whole claim will be forfeited, along with any subsequent claims to the date of fraud, and any interim payments on the claim should be returned by the assured.²⁵²¹ However, valid previous claims where the loss occurred before fraud will not be affected, whether the claim was paid or not.²⁵²² Furthermore, damages which compensate actual costs borne by the insurer for fraud investigation and which are reasonable and proportionate with the circumstances can be claimed from the assured, provided they are not offset from the savings made by the forfeiture of the valid claim.²⁵²³ Such proposals are default in business insurance, and therefore parties can contract out of them by express terms, whereas in consumer insurance, insurers cannot stipulate remedies which give them greater rights.²⁵²⁴

²⁵¹⁹ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm>> accessed in 28 March 2014.

²⁵²⁰ LCCP2011 para 7.45.

²⁵²¹ LCCP2011 para 8.2.

²⁵²² Ibid.

²⁵²³ Ibid 8.3-8.4.

²⁵²⁴ Ibid.

The proposal for the forfeiture of the fraudulent claim only is considered a codification to the current state of the case law to provide more clarity.²⁵²⁵ False and genuine parts of the claim do not need to be given at the same time provided they are parts of the same claim.²⁵²⁶ However, the LCCP2011 preferred to leave it to courts to decide the meaning of single claim, depending on the circumstances of each case.²⁵²⁷ As for paying the previous valid claims, the LCCP2011 is convinced that avoidance of such claims is unprincipled and impractical.²⁵²⁸ It is unprincipled in the sense that it allows valid claims to be affected by later incidents, and impractical as courts try always to escape its harshness and money may already have been spent.²⁵²⁹ In respect of subsequent claims, as the insurer can have the right to terminate the contract with a prospective impact after fraud,²⁵³⁰ the LCCP2011 opts to provide clarity to the uncertain legal situation of claims arising between fraud and the termination of the contract, and hence proposed the forfeiture of subsequent claims as an alternative solution to hasty terminations by insurers suspecting fraud.²⁵³¹ Such claim forfeiture will have effect even when the claim is raised before finding out about fraud or before beginning to

²⁵²⁵ LCCP2011 paras 8.7–8.8; *Galloway v Guardian Royal Exchange* [1999] Lloyd's Rep IR 209; *Agapitos v Agnew (The Aegeon) (No1)* [2002] EWCA Civ 247, [2002] Lloyd's Rep IR 573 ; See Ch 5 under 5.9.

²⁵²⁶ LCCP2011 8.9; *Aviva Insurance v Brown* [2011] EWHC 362 (QB), [2012] Lloyd's Rep IR 211.

²⁵²⁷ LCCP 2011 paras 8.9–8.10.

²⁵²⁸ LCCP2011 paras 8.14–8.16.

²⁵²⁹ *Ibid* 7.10–7.16; 8.14–8.16.

²⁵³⁰ *Axa General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112, [2005] 1 All ER (Comm) 445 [22] (Mance LJ) (fraud is seen as a breach of the contract entitling for repudiation) See above.

²⁵³¹ LCCP2011 para 8.11.

terminate the policy.²⁵³² Nonetheless, the insurer must take prompt steps for policy termination and inform the assured of the termination of the contract once fraud is discovered; otherwise his right of defence towards subsequent claims will be waived.²⁵³³

Finally, the LCCP2011 proposed damages as compensation for the insurer against costs incurred as a result of investigating fraudulent claims, since they can play a preventive role restricting assureds from presenting completely false claims, something not provided by the forfeiture of the claim.²⁵³⁴ Such damages are proposed to be limited to compensate actual costs which are reasonable and proportionate to the circumstances, and which are not covered by the savings made from the forfeiture of the valid claim.²⁵³⁵

In business insurance, the LCCP2011 supports parties' ability to include express terms in the contract which provide different remedies to fraudulent claims.²⁵³⁶ However, those terms must be clearly drafted and brought to the attention of the party disadvantaging from them, whether it is the assured, for example if the insurer lists avoidance as a remedy, or the insurer for example when the term decreases the sanctions on the fraudulent assured.²⁵³⁷ On the other hand, in consumer insurance any express term which gives the insurer more rights than the

²⁵³² Ibid 8.12.

²⁵³³ Ibid 8.13.

²⁵³⁴ Ibid para 8.19.

²⁵³⁵ LCCP2011 paras 8.19–8.23.

²⁵³⁶ Ibid 8.24–8.27.

²⁵³⁷ Ibid.

statutory remedies regard fraudulent claims will have no effect.²⁵³⁸ Such protection is justified, as consumers may not realise the implications of avoidance for fraud, even though the UTCCR1999 and the FOS provide some protection in this respect.²⁵³⁹

The draft clauses of the forthcoming Insurance Contract Law Draft Bill were recently issued, and they state clearly the remedies when the assured makes a fraudulent claim.²⁵⁴⁰ It must be noted that those draft clauses are only applicable regarding the fraudulent claims made by the assureds and not third parties, and only in respect of fraudulent insurance claims and no other claims.²⁵⁴¹

To be specific, the draft Bill states that when the assured makes a fraudulent claim in respect of the insurance policy: there will be no liability for the claim's payment,²⁵⁴² any amounts paid regarding the claim can be recovered by the insurer,²⁵⁴³ and the insurer can terminate the contract from the time of the fraudulent act provided he gives notice to the assured.²⁵⁴⁴ The

²⁵³⁸ Ibid 8.28-8.30.

²⁵³⁹ Ibid.

²⁵⁴⁰ For the draft clauses, see <<http://lawcommission.justice.gov.uk/consultations/insurance-draft-clauses.htm> > accessed in 28 March 2014; see below.

²⁵⁴¹ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf > accessed in 28 March 2014, para 3.7.

²⁵⁴² Ibid, cl 11(1)(a).

²⁵⁴³ Ibid, cl 11(1)(b).

²⁵⁴⁴ Ibid, cl 11(1)(c); Establishing waiver when the insurer does not give notice to the assured about the termination soon enough after discovering fraud may be possible. The issue of assessing the sufficiency of the

insurer's right to terminate the contract will be upheld regardless of the expiry of the contract before finding out about fraud.²⁵⁴⁵ The insurer who chooses termination can refuse to be liable to the assured under the insurance contract for any event which occurs subsequent to the fraudulent act, and he can retain the premiums.²⁵⁴⁶ However, when the insurer chooses to do so, that termination will not have an impact on the parties' rights and duties under the policy for any event which happens before the fraudulent act.²⁵⁴⁷ The 'event' above means anything under the policy which incurs the liability on the insurer, e.g. occurrence of a loss, or notification of a claim.²⁵⁴⁸

The draft Bill does not determine when the claim is to be considered fraudulent, or the remedies in case of using fraudulent means and devices which are left for courts and

time for the insurer after discovering the fraud to inform the assured about termination must balance the interests of the assured in prompt notice and the insurer in having time for investigation, and the Law Commissions opted that such issue can be determined by a regulation as best practice, and not by the draft Bill; The insurer will be liable to pay subsequent losses after the fraudulent act if he did not choose to use his right to terminate the contract; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 3.16-3.17.

²⁵⁴⁵ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 3.13.

²⁵⁴⁶ Ibid, cl 11(2).

²⁵⁴⁷ Ibid, cl 11(3).

²⁵⁴⁸ Ibid, cl 11(4).

common law principles.²⁵⁴⁹ The same is applied as regards determining when several claims are to be treated as one whole claim, and the courts' approach seem to widen the definition of a 'whole claim'.²⁵⁵⁰ Additionally, the draft Bill does not incorporate the suggestion of having a statutory duty on the assured to pay fraud investigation costs.²⁵⁵¹ The impact of the draft Bill though is that it makes it clear that fraudulent claims are not to be treated as a breach of the duty of good faith, and valid claims before fraud must be paid.²⁵⁵²

It must be noted that the contracting out of those rules by a disadvantageous term which puts the assured in a worse position than the Bill is not allowed for consumer insurance,²⁵⁵³ while it is allowed in non-consumer insurance provided transparency requirements are satisfied.²⁵⁵⁴

²⁵⁴⁹ *Butler and Merkin's Reinsurance Law*; For definition of fraudulent claims, see *Derry v Peek* (1889) LR 14 App Cas 337; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 3.9.

²⁵⁵⁰ The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, paras 3.10-3.11.

²⁵⁵¹ *Butler and Merkin's Reinsurance Law*; The justifications for that is that they are too complicated; they can lead to increasing investigation costs and premiums, and they do not really deter fraud; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 3.29.

²⁵⁵² *Butler and Merkin's Reinsurance Law*.

²⁵⁵³ *Ibid*, cl 15 ; For more detailed explanation on contracting out see Ch 5 under 5.10.

²⁵⁵⁴ *Ibid*, cls 16, 17.

In any case, rules on contracting out do not apply to settlement agreements or cancellation clauses.²⁵⁵⁵ Therefore, in consumer insurance using less favourable terms than the provisions in the Insurance Contract Law Draft Bill is allowed as the prohibition will not be applicable.²⁵⁵⁶ Also, the conditions of transparency will not be needed for non-consumer insurance.²⁵⁵⁷

²⁵⁵⁵ Ibid, cls 15(4),16(6).

²⁵⁵⁶ Ibid, cl 15(4).

²⁵⁵⁷ Ibid, cl 16(6).

7.3 LEGAL REMEDIES IN SAUDI INSURANCE LAW

It must be noted that the consequences for breaching good faith generally on the contract are not really clear in Saudi insurance laws, whether concerning the pre-contractual or the post-contractual stage.²⁵⁵⁸ Therefore, in this section the author will attempt to review the relevant laws and regulations, the UCMIP, and the practice of the IVDRC to find some guidance on any possible remedies in case of breaching the duty of good faith, non-disclosure, or misrepresentation as they occur.²⁵⁵⁹ As discussed earlier, a general duty of good faith is only announced on the insurer by the IMCOCR2008, but in practice the IVDRC considers that the duty of good faith is mutual and expects that it is to be complied with from both the insurer and the assured.²⁵⁶⁰ Also the AFR2008 forbids any fraudulent or dishonest conduct by the insurer or the assured aiming for an unlawful advantage, and misrepresentation and non-disclosure are provided as non-exhaustive examples.²⁵⁶¹ In any case, a general remedy which is beneficial to the assured when the insurer breaches his duty of good faith is not provided by the IMCOCR2008 or the AFR2008, while the IVDRC practice provides some remedies for the assured and the insurer for non-innocent breaches of good faith.²⁵⁶² It must be noted that post-contractual duty of good faith incidents and remedies were discussed earlier in chapter 5, and these must be read in conjunction with this section.²⁵⁶³

²⁵⁵⁸ See below.

²⁵⁵⁹ Not depending on the pre- or post-contractual remedies classification.

²⁵⁶⁰ See Ch 5 under 5.5.

²⁵⁶¹ Art 5 AFR20008.

²⁵⁶² See below.

²⁵⁶³ See Ch 5, 5.9.

I In The CCL1931

Article 342 provides that if anything in the contract that must be disclosed is not disclosed, is misrepresented, or is different from what it is in the bill of lading, the assured will be liable. The insurance contract will be void, even if the insured subject matter was not lost or destroyed. Avoidance will be the remedy, even there is no risk from such non-disclosure or misrepresentation, or the risk is in a degree different from what it was thought to be. Such an approach is justified, as insurers may not have insured the risk in the first place, or they might have contracted on different terms had they known the true facts.

In the realm of fraud by the assured, Article 351 provides that if insurance was conducted for an amount more than the value of the ship, this is considered fraud and renders the contract void.

From the above, it seems that the CCL1931 does not distinguish between types of misrepresentation or non-disclosure based on the assured's state of mind, just like the MIA1906.²⁵⁶⁴ It provides avoidance for all kinds of breach of the duty of good faith, even for innocent and honest breaches.²⁵⁶⁵ Nonetheless, in practice, as discussed in chapter 3, the CCL1931 does not play any role, as the IVDRC does not apply it. It is considered an archaic law with no real role in the commercial reality.²⁵⁶⁶

²⁵⁶⁴ MIA1906, ss 17-20.

²⁵⁶⁵ See above.

²⁵⁶⁶ See Ch 3.

II In The LSCIC2003, IMCOCR2008, And AFR2008

It is interesting to note that neither of these insurance laws and regulations have provided the effect of breaching the duty of good faith on the insurance contract itself. The LSCIC2003 provides that if anyone violates the law or the implementing regulations, he will face a penalty of no more than one million Saudi Riyals and/or a prison term no longer than four years.²⁵⁶⁷ It also provides disciplinary measures to be applied by SAMA, but where the company is still in violation despite the measures, SAMA can request that it is to be wound up.²⁵⁶⁸ The IMCOCR2008 stipulates that any violation to the regulation will be deemed a breach to the licensing conditions and may subject the insurance company to an enforcement action.²⁵⁶⁹ Hence, both the LSCIC2003 and the IMCOCR2008 can consider the breach of good faith a breach of a statutory duty, but that has no benefit to the assured as it only incurs disciplinary actions on the insurer or the intermediary.²⁵⁷⁰

As for the AFR2008, as it was stated earlier, it seems that it differentiates between fraudulent misrepresentation or non-disclosure on the one hand and non-fraudulent misrepresentation or non-disclosure on the the other.²⁵⁷¹ In fact the distinction can be more general to include any fraudulent or dishonest conduct by the insurer or the assured, aiming for an unlawful advantage as misrepresentation and non-disclosure are provided as non-exhaustive

²⁵⁶⁷ Art 21 LSCIC2003.

²⁵⁶⁸ Art 19 LSCIC2003.

²⁵⁶⁹ Art 9 IMCOCR2008.

²⁵⁷⁰ See above.

²⁵⁷¹ Art 5 AFR2008; See Ch 5 under 5.6.

examples.²⁵⁷² However, the consequences of such distinction on the contract and remedies are not clear whether for the assured or the insurer. Instead, the AFR2008 obliges the insurer to inform assureds about the consequences of any misrepresentation, as article 51 provides under the section provided for fraud by the assureds that,

“Companies should inform policyholders about their anti-fraud policies and the consequences of providing false or inaccurate information. Furthermore, an information section can be included in the text of the policy itself to ensure policyholders read and agree to the measures in place.”

This means that insurers are allowed to articulate their own remedies for misrepresentation by express terms, but they must inform the assureds of any remedies for misrepresentation and about their anti-fraud policies. Having such an article under the section provided for the fraud by the assured means that most probably what is meant here is the fraudulent misrepresentation by the assured; however, there is no reason to refrain the insurer from including other types such as innocent or negligent misrepresentations by express remedies in case of breach. It seems that that the provision is general, which means it can include any pre- or post-contractual fraudulent misrepresentations by the assured. Non-disclosure specifically is not mentioned in the article above; however, there is no reason to prevent not including it.

As stated in chapter 5,²⁵⁷³ article 45 of the AFR2008 provides examples of fraud which include the pre-contractual and post-contractual stage, which include misrepresentation, concealment, and fraudulent claims; however, no specific remedies are provided.

A justification behind this unclear position by the insurance laws and regulations regarding the remedies available after breaching the duty of good faith may be that they are more of

²⁵⁷² Ibid.

²⁵⁷³ See Ch 5 under 5.9.

market regulators than contract laws. However, given the present situation of the insurance law in Saudi Arabia, the author suggests that remedies of breaching good faith must be embedded in the IMCOCR2008. The IMCOCR2008, even though not an insurance contract law per se, is the only source of detailed obligations and rights of the insurance parties. It would be of great advantage if the consequences of breach were added to those rights and duties, to provide clarity to the position of the parties and remove any misconception. This legal vacuum can be exploited by insurers, who can stipulate their own remedies for breach by the assured, in the contract.²⁵⁷⁴ This matter can raise particular concern to consumers, since they are in a less powerful position to negotiate any changes.

III In The Unified Compulsory Motor Insurance Policy (UCMIP)

In an attempt to find a source of authority demonstrating the remedies available to the insurance parties when they are in breach of good faith, it is worth considering the UCMIP, issued by SAMA.²⁵⁷⁵ The policy covers only civil liability to third parties and it is drafted by the regulator of the insurance activities in Saudi Arabia, i.e. SAMA, and must be used by all insurers.²⁵⁷⁶ Hence, it is a neutral and legal source for all the rights and obligations of the parties in this type of insurance. The UCMIP takes into account the compulsory nature of the policy, and therefore aims to regulate the market for the interest of consumers who cannot negotiate better terms.²⁵⁷⁷ The violation of the assured or the driver to the policy does not

²⁵⁷⁴ In fact that is demanded from the insurer as regards the assured's fraudulent misrepresentation as stated earlier by Art 51 AFR2008.

²⁵⁷⁵ The Policy was published on 13/12/2011 by SAMA and can be found in <http://www.sama.gov.sa/Insurance/InsuranceLib/Policy_4600_C_UnifiedPolicy.pdf> accessed on 23 December 2011.

²⁵⁷⁶ Art 1, 2(1) UCMIP.

²⁵⁷⁷ A uniform policy was issued for health insurance by the Council of Cooperative health Insurance as well (by Ministerial decision No DH/1/30/6131 dated 2/6/2009, however it is only a model for guidance and not obligatory; See

relieve the insurer from his liability to indemnify the third party with his right to recover afterwards from the assured or the driver.²⁵⁷⁸ Article 6 of the policy numerates a list of situations where the insurance company will be liable for the third party directly, but maintains the right to come back on the insured, the driver, or the liable for the accident. One of those situations is when the insured has misrepresented or has not disclosed material facts in the application form which may affect the decision of the insurance company in terms of accepting the insurance cover, or determining its price or conditions.²⁵⁷⁹ Another numerated situation is when there is unreported material change of information that was provided in the application form. The insured usually bears to report such change in writing within 10 days to the insurer.²⁵⁸⁰ The remedy in those situations may not be appealing for insurers, as it obliges them to pay the third party regardless of the assured's breach.²⁵⁸¹ However, it offers great protection for third parties, who are the real sufferers in such situations.²⁵⁸² If English insurance laws were employed in such scenarios, the liability would not be as strict as in Saudi Arabia, as the insurer has the right to avoid within three months from proceedings

<<http://www.cchi.gov.sa/en/Rules/Documents/Cooperative%20Health%20Insurance%20Policy.pdf>> accessed 20 Dec 2011.

²⁵⁷⁸ Art 5 UCMIP.

²⁵⁷⁹ Art 6 (4) UCMIP.

²⁵⁸⁰ Art 6 (4) UCMIP.

²⁵⁸¹ Ibid.

²⁵⁸² Various cases are reviewed regarding that matter and it was observed that strict liability approach is applied by the IVDRC to protect third parties as long as there is an insurance policy and a valid driving licence; Insurance case dated 18/7/2009; Insurance case dated 10/11/2011; Insurance case dated 4/4/2010; Insurance case dated 20/2/2010; Art 6, 7, 8 (7) UCMIP.

against the assured.²⁵⁸³ If he does, the Motor Insurance Bureau will pay the third party and then nominate the avoiding insurer to pay.²⁵⁸⁴ Moreover, the insurer in the UCMIP will be liable for compensating the beneficiary in the policy for any costs incurred by the loss of the vehicle resulting from the delay in settling the claim for more than 15 days without an acceptable excuse.²⁵⁸⁵

In respect of fraudulent insurance claims, the UCMIP provides that any rights under the policy will be forfeited or dropped if the claim presented is tainted with fraud.²⁵⁸⁶ The same will be applied when the insured, the driver, their agents, or other parties have used fraudulent ways or tricks to benefit from the policy, or if the liability or damage has been a result of a deliberate act from the insured, the driver, or the third party, or in agreement with any of one of them. The insurance company can come back on any of those aforementioned parties, but that does not affect its obligation to provide indemnity for the third party acting in good faith.²⁵⁸⁷ It is clear that the policy again protects third parties by compensating them even in the event of fraudulent claim by the assured. In respect of the assured, it seems that he will be deprived from any benefit from the policy if at least one claim is fraudulent. Nonetheless, it is not clear whether the ‘forfeiture’ means the forfeiture of the fraudulent claim and the previous valid claims or just the fraudulent claim while previous valid claims remain unaffected, as it

²⁵⁸³ Road Traffic Act 1988, s 152.

²⁵⁸⁴ Ibid.

²⁵⁸⁵ Art 8 (6) UCMIP.

²⁵⁸⁶ Art 8(7) UCMIP.

²⁵⁸⁷ Art 8 (7) UCMIP.

is in English common law.²⁵⁸⁸ Also, the exact fate of the insurance policy tainted with the fraudulent claim is not clear, whether it can be terminated or not, and also the fate of any subsequent claims.²⁵⁸⁹

IV The Practice of the IVDRC:

In practice, the IVDRC considers the assured's state of mind, and differentiates between innocent and non-innocent breaches of good faith as it considers each case based on its circumstances and remedies will vary accordingly.²⁵⁹⁰ Again, the exact effects of this distinction and the remedies are not totally clear. However, the IVDRC provides that in case of non-innocent breach of good faith by the assured, the remedy will be that the assured or the beneficiary's insurance claim will be dropped or forfeited as fraud vitiates the contractual relationship if proved.²⁵⁹¹ On the other hand, if the insurer non-innocently breaches good faith, then he must pay insurance on the claim provided it has satisfied the conditions, together with compensation for any harm or expenses which are incurred by the assured.²⁵⁹²

²⁵⁸⁸ See above.

²⁵⁸⁹ See above .

²⁵⁹⁰ It is worth mentioning that IVDRC stated at the beginning that violating good faith is considered fraud, which gives the impression that fraud and breach of good faith are the same thing; in other words that there is no consideration of the assured's state of mind – whether he is innocent, deliberate etc. However, that is not the situation, as it later stated that it uses its discretion to consider the assured's state of mind, whether he is innocent or not based on the circumstances of the case and remedies, will vary accordingly. Hence, the author's conclusion is that what is meant here is that there is distinction between innocent and non-innocent breaches of good faith ; Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

²⁵⁹¹ Ibid.

²⁵⁹² Ibid.

As in the UCMIP, it is not clear if dropping or forfeiting the insurance claim will include previous valid claims or whether they will remain unaffected. Also the fate of the insurance policy, the right of the insurer to terminate, and the fate of subsequent claims are not clear. In case of innocent or negligent breaches, the position remains elusive and probably governed by the IVDRC discretion.²⁵⁹³ In general, it can be stated that the Saudi insurance laws regarding the remedies of breaching good faith are unclear, inconsistent and hard to comprehend. What are found are some unspecific provisions scattered among different set of laws and regulations. Adding to the complication, some types of insurance provide their own remedies and the IVDRC in practice applies certain remedies in cases of non-innocent breach of the duty of good faith.²⁵⁹⁴ Hence, it would be really helpful if the remedies for breaching good faith were stipulated precisely for both parties by the regulators and not by the insurers. Also, it is recommended that they are to be set in one place, such as the IMCOCR2008, as a general rule, to avoid complexity and to clarify the legal position of the remedies. The legal vacuum regarding the remedies is filled in practice already by insurers' own terms. Insurers can stipulate what they want as remedies for breaching good faith by the assured, with no specified limits, and for fraudulent misrepresentation, they are obliged to inform the assured about its consequences and about their anti-fraud policies.²⁵⁹⁵ On the other hand, insurers are not obliged to stipulate any remedies available to assureds if they as insurers violate good faith in preforming their duties under the policy. This result is unacceptable and reminds us of

²⁵⁹³ The author believes that the problem is that such practice by the IVDRC is not supported by clear legal provisions, which may cause uncertainty and confusion, something which the IVDRC itself confirmed later in its suggestions for reform; interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

²⁵⁹⁴ See the UCMIP for example; See above.

²⁵⁹⁵ See Art 51 AFR2008.

the hectic legal situation before the promulgation of the LSCIC2003, where insurers were the regulators of the insurance contract.²⁵⁹⁶ Hence, it is suggested that SAMA provides the remedies of breaching good faith in the insurance contract as part of its regulations. The nature of those remedies, however, is a matter of discussion.

²⁵⁹⁶ See Ch 3.

7.4 THE WAY FORWARD FOR THE RIGHT REMEDY?

As a starting point, the author suggests that a uniform set of remedies in case of breaching good faith must be available for both businesses and consumers. In Saudi Arabia, there are no different regulations for businesses and consumers. However, in English insurance law, differentiation between business and consumers was opted in the legal reforms which ended in articulating CIA2012 for consumers.

The author discussed previously, in the context of the materiality test for non-disclosure and misrepresentation, that business and consumer assureds should have the same type of protection.²⁵⁹⁷ If the law is unfair, it must be altered as a whole, without relying on the type of the assured.²⁵⁹⁸ True, consumers can suffer unfairness more than businesses; however, articulating different regimes will create complexity in law unnecessarily.²⁵⁹⁹ It can create arbitrary and inaccurate thresholds between small, big, and micro businesses in offering the protection needed.²⁶⁰⁰ This makes the law more complicated to apply and to understand. In England, the UTCCR1999 can prevent any unfairness to consumers, whereas in Saudi Arabia, any unfairness to the consumer can be averted by the judge or by some provisions in the law itself. The author has argued earlier in favour of abolishing the duty of disclosure for both consumers and businesses.²⁶⁰¹ In respect of the duty of good faith, it has also been discussed

²⁵⁹⁷ See Ch 5 under 5.7.3.

²⁵⁹⁸ Ibid.

²⁵⁹⁹ Ibid.

²⁶⁰⁰ Ibid; See The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law: Micro-Businesses, Should Micro-Businesses be Treated Like Consumers for the Purposes of Pre-Contractual Information and Unfair Terms?* (Issue Paper 5, 2009).

²⁶⁰¹ See Ch 5 under 5.7.2 , 5.7.3.

that the IVDRC differentiates between innocent and non-innocent breaches of good faith, the AFR2008 differentiates between fraudulent and non-fraudulent conduct, and the IMCOCR2008 provides a statutory obligation on the insurer to act in good faith, but no clear general remedy for breach is provided whether for the pre-contractual or the post-contractual period, except what is indicated in the practice of the IVDRC in case of non-innocent breaches.²⁶⁰² In respect of pre-contractual breaches of good faith in English insurance law, the MIA1906 provides avoidance *ab initio* as a remedy for breach in business insurance,²⁶⁰³ while the CIA2012 removes the principle completely for consumer insurance.²⁶⁰⁴ For post-contractual breaches, the general remedy seems to be avoidance *ab initio* for both consumer and business insurance.²⁶⁰⁵ The suggested reforms for business insurance in the LCCP2012 recommends retaining the duty of good faith as an interpretive general principle without any remedies of its own and the draft clauses of the Insurance Contract Law Draft Bill recently issued adopt such an approach.²⁶⁰⁶ This will also apply for post-contractual breaches of good faith in consumer insurance.²⁶⁰⁷ The author believes that the duty of good faith should still

²⁶⁰² See above under 7.3; See also Ch 5 under 5.3, 5.5, and 5.6; The remedies are probably general as it was not indicated that they concern the period before or after the contract.

²⁶⁰³ See above under 7.2.1; See Ch 5 under 5.3; MIA1906, s 17.

²⁶⁰⁴ See above under 7.2.1; See Ch 5 under 5.3; CIA2012, s 2.

²⁶⁰⁵ See Ch 5 under 5.9; It must be noted that the CIA2012 amends the situation for consumer insurance for the pre-contractual period only. Therefore for the post-contractual period, the MIA1906 and common law will still apply and avoidance *ab initio* can have effect ; R. Merkin, *Colinvaux's Law of Insurance* (2nd supp, 9th edn, Sweet and Maxwell 2013) para 6-002A.

²⁶⁰⁶ See above under 7.2.1; See Ch 5 under 5.3; LCCP2012 para 10.19-10.22; Insurance Contract Law Draft Bill, cl 14.

²⁶⁰⁷ *Ibid.*

exist in Saudi insurance laws as it coincides with the Islamic contract law and a statutory effect of its mutuality should be adopted for clarity.²⁶⁰⁸ As for the remedy, the author suggests that damages can be provided as a general remedy for breaching the duty of good faith.²⁶⁰⁹ The IVDRC can also add other remedies depending on the nature of the breach in question and the circumstances. However, the author believes that the most evident violations of good faith, most importantly by: misrepresentation, fraudulent claims, and late claim payment must have their special remedies stipulated in the laws and regulations for clarity.²⁶¹⁰ Hence, the general remedy will be applied only if the incident of breach is not covered by special provisions.

²⁶⁰⁸ See Ch 5 under 5.5.

²⁶⁰⁹ It must be noted that damages in Islamic general contract law only compensate actual foreseeable loss, and not consequential unforeseeable loss, economic loss of chance, or loss of profits. The reason is that such damages are too speculative and contain an element of uncertainty (P. Slone, 'The Status of Islamic Law in the Modern Commercial World' (1988) 22 Int'l L 743, 746 ; see also N. Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Trotman 1984) 59 , such approach seem to be similar to English general contract law when damages are paid for a breach of a contractual obligation (*Hadley v Baxendale* (1854) 9 Ex 341). If Islamic law were to be applied strictly on insurance contracts in Saudi Arabia, damages would be awarded only to compensate actual and foreseeable loss. However, as discussed in chapter 3, the insurance laws and practice in Saudi Arabia is surrounded by doubts from *Sharia'a* law perspective as applied there claiming that it does not conform to it. Hence, the conditions of awarding such damages will depend on whether the regulator applies Islamic general contract law, or if it takes another approach diverting from it. The author believes that the latter approach will probably be applied given that insurance laws already depart from Islamic law in various aspects and are not viewed by *Sharia'a* law judges or courts; See Ch 3 for more details.

²⁶¹⁰ The author argued in chapter 5 that there is no reason to refrain from classifying fraudulent claims and late claim payments in Saudi insurance laws as a breach of the duty of good faith. In fact such approach seems to be followed by the IVDRC; See Ch 5, 5.9.

Given the ambiguous situation of remedies in Saudi insurance laws, the main discussion will be based on the CIA2012 and the LCCP2012, and their approach in tackling remedies regarding misrepresentation, fraudulent claims and late payment of claims as an illustration to develop Saudi insurance laws and their approach.

7.4.1 Pre-contractual Remedies

I No Remedies to the Insurer: (Reasonable Care not to Make a Misrepresentation, CIA2012)²⁶¹¹

The author views this approach as favourable, as it complies with the reasonable expectations of the assured, which must be protected as a basic principle. It is suggested that Saudi insurance laws provide such approach for assureds who take reasonable care in not committing misrepresentations in a clear manner. True, Islamic law does not welcome the investigation of the psychological side of consent, and the defects of consent theory plays a subsidiary role, except in cases of violence.²⁶¹² However, that does not mean that the reasonable expectations of the assured should not be protected, as Islamic law provides the

²⁶¹¹ See above under 7.2.1 ; The CIA2012 does not consider the misrepresentation where the assured took reasonable care not to commit it a qualifying misrepresentation which incurs any remedies. Under the CIA2012, s 4 , the insurer will have a remedy only for qualifying misrepresentation which happens only if the consumer did not take reasonable care not to make a misrepresentation and where such misrepresentation has induced him into the contract ; See also CIA2012, ss 3, 5; See Ch 5 under 5.3 and 5.6 for more.

²⁶¹² See Ch 4.

options system for that end.²⁶¹³ Nonetheless, the options system offered to provide fairness, does not work in insurance contracts in the same way as in contracts of sale, and therefore investigating the consent to determine reasonable care in not committing a misrepresentation within insurance contracts has a strong ground to provide fairness.²⁶¹⁴

II Proportionate Remedy: (Careless Misrepresentation, CIA2012/Non-Dishonest Conduct, LCCP 2012 /Non-Deliberate and Reckless Breach, Insurance Contract Law Draft Bill)²⁶¹⁵

In the case of consumer insurance, it was stated that a proportionate remedy is the best remedy in such a situation, since it provides fairness to the assured, and since consumer insurance has a lower variety of unusual risks, unlike business insurance.²⁶¹⁶ Also, in England, such remedy has been applied for more than 20 years with no problems and has been approved by the insurance industry.²⁶¹⁷

Generally speaking, the author does not think that a proportionate remedy is suitable for consumers or businesses, even though it may create more fairness to the assured, in England

²⁶¹³ Ibid.

²⁶¹⁴ Ibid.

²⁶¹⁵ In respect of careless misrepresentation, the CIA2012 applies a proportionate remedy which considers the state of mind of the assured, and what the insurer would have done had the consumer assured complied with his duty under s 2(2) . The LCCP2012 proposes the same remedy for all conducts which are not dishonest for business insurance. The remedies range from reduction in the claim if the insurer would have charged more, to avoidance if the insurer would have declined the risk all together; see above under 7.2.1.

²⁶¹⁶ LCCP2007 paras 4.153-4.190.

²⁶¹⁷ National Consumer Council, *Insurance Law Reform* (May 1997) 26; LCCIL2009 paras 6.54–6.82.

or Saudi Arabia. A proportionate remedy as embedded in the CIA2012 will depend on imagining situations and speculating what the insurer would have done had the consumer assured complied with his duty under section 2(2). Such a task is difficult for the courts. Even though the FOS and courts are used to dealing with such imaginary questions,²⁶¹⁸ it cannot be denied that it is a complex and time consuming operation and has a great level of inaccuracy. Additionally, since the only way to know the outcome of the remedy is through courts, there may be an ambiguity in the legal position of remedies for misrepresentation in insurance contracts. It must be remembered that insurance is an industry where certainty, especially in the formation period of the contract, plays a vital role, even more so than any other contract, such as sales. Certainty is more important in business and commercial laws, which makes the adoption of the LCCP2012, and recently the draft clauses of the Insurance Contract Law Draft Bill regarding non-deliberate and reckless breaches of the duty to make a fair presentation of the risk by the non-consumer assured to the proportionate remedies questionable.²⁶¹⁹ True, fairness to the assured is important, but it must not be at the expense of the certainty of laws. It is worth noting that a proportionate remedy which considers the state of mind of the assured was rejected for business insurance in the LCCP2007, since it was difficult to apply in practice.²⁶²⁰

Additionally, in the context of proportionate remedies, it was argued that such a remedy includes problems of proof.²⁶²¹ The insurers in the CIA2012 must prove what they would have done if the consumer had complied with his duty in section 2(2). Therefore, they must

²⁶¹⁸ See LCCP2007 paras 4.153-4.190; LCCIL2009 paras 6.54-6.82.

²⁶¹⁹ See Insurance Contract Law Draft Bill, sch 1, prt1, cls 3, 4; LCCP2012 prt 9.

²⁶²⁰ LCCP2007 paras 5.49-5.54.

²⁶²¹ B. Soyer, 'Reforming the Assured's Pre-Contractual Duty of Utmost Good Faith in Insurance Contracts for Consumers: Are the Law Commissions on the Right Track?' (2008) 5 JBL 385, 408-409 .

prove that they would have not entered the contract if that is the case, or if they would have entered the contract but on different terms, they must prove on what terms they would have done so.²⁶²² If they would have charged more on the premium, they must prove how much the premium would be.²⁶²³ Furthermore, the remedy can be arbitrary in the sense that the court may be persuaded by the conditions relevant to the assured.²⁶²⁴

As for Saudi insurance laws, such a remedy would not be practical either. The IVDRC is relatively new, as are the insurance laws and regulations. The IVDRC is not used to such hypothetical sets of questions or to applying such a type of remedy, and does not have a high enough volume of cases to be able to be guided by them in that matter. *Sharia'a* law cases will not be much help, since they rely on objective measures.²⁶²⁵ Besides, this proportionate remedy does not correspond with the objectivity of Islamic law, which does not question the psychological side of consent.²⁶²⁶ Islamic contract law safeguards the balance and fairness in the contract by providing the parties with the system of options.²⁶²⁷ These options provide fairness without relying on the subjective measures relating to the parties' psychological side of consent.²⁶²⁸

²⁶²² Ibid.

²⁶²³ Ibid.

²⁶²⁴ Ibid.

²⁶²⁵ See Ch 4.

²⁶²⁶ Ibid.

²⁶²⁷ Ibid.

²⁶²⁸ Ibid.

Between avoidance, which seems to be rather an extreme remedy in this type of misrepresentation, and having no remedies, which is rather generous for a careless behaviour, one can think of a remedy which sits somewhere in the middle. It must provide a remedy for the insurer, but be neither too harsh nor too lenient on the assured, and not difficult to apply or comprehend. The author believes that damages in case of careless misrepresentation are a suitable solution. It is worth mentioning that damages are possible to be awarded under the Misrepresentation Act 1967 in English general contract law for careless misrepresentation.²⁶²⁹ Thus, such a remedy can bring insurance law more in line with general contract law, which makes it easier for courts to apply, and to explain.

III Avoidance, Refusal of All Claims, Premiums Retained: (Deliberate Or Reckless Misrepresentations , CIA2012 /Dishonest Conduct, LCCP 2012/ Deliberate Or Reckless Breaches, Insurance Contract Law Draft Bill)²⁶³⁰

²⁶²⁹ Misrepresentation Act 1967, s 2(1) and s 2 (2); Damages will be measured according to the tort of deceit which make it include consequential unforeseeable damages if the misrepresentation was careless ; See Ch 4 for more.

²⁶³⁰ For deliberate and reckless misrepresentations, the CIA2012 provides avoidance of the whole contract and refusing all claims as a remedy just like Islamic contract law when dealing with fraud or misrepresentation. On top of that, the insurer has the right to retain the premiums unless it creates unfairness to the assured. The LCCP2012 suggests the same remedy for dishonest conduct; however the court will not have the discretion to return the premiums to the business assured, and that is adopted in the draft clauses of the Insurance Contract Law Draft Bill for deliberate and reckless breaches to the duty to make a fair presentation of the risk. The MIA1906 which still applies for business assureds provides avoidance *ab initio* in case of breaching good faith regardless of the assured's state of mind and therefore premiums will be returned to the assured unless in case of fraud or if the policy provides otherwise (MIA1906, s 84 (1)) ; see above 7.2.1.

In such circumstances, avoidance seems to be a fair solution from a public policy perspective. It alerts the society to the consequences of deliberate or reckless conduct and sends a message to the public for strict disapproval of any immorality, which will affect any intentions for such behaviours.²⁶³¹ From an insurer's perspective, retaining the premium seems to have its advantages, in decreasing their wasted resources on proving such conduct by the assured.²⁶³² In other words, it can be a kind of compensation for such conduct by the assured, which can decrease expenses or losses incurred by the insurer.²⁶³³ Moreover, the remedy of avoidance for such conduct makes the English law more in line with other EU jurisdictions, e.g. Germany.²⁶³⁴ However, it may be argued that avoidance can be harsh in the sense that it may be disproportionate with the breach which can be of a minor nature.

The author views avoidance as a suitable remedy for deliberate and reckless misrepresentation for both Saudi and English insurance laws. In Saudi Arabia, avoidance in such circumstances will bring insurance law closer to general contract law, which is a favourable approach.²⁶³⁵ Nonetheless, paying the claim or a proportion of it instead of avoidance may be suitable and provides more fairness in some types of deliberate misrepresentation. For example, when the assured slightly overprices the contents of an

²⁶³¹ LCCP2007 paras 4.50–4.99; LCCIL2009 para 6.16.

²⁶³² B. Soyer, 'Reforming the Assured's Pre-Contractual Duty of Utmost Good Faith in Insurance Contracts For Consumers: Are the Law Commissions On the Right Track?' (2008) 5 JBL 385, 406 .

²⁶³³ Ibid; It must be noted that in avoidance according to the MIA1906, premiums are returned to the assured except in fraud or if the policy provides otherwise (MIA1906, s 84(1)); See LCCIL2009 paras 6.40–6.48.

²⁶³⁴ Ibid ; German Insurance Contract Act 2008, s 19; See also Australian Insurance Contracts Act (Cth) 1984, s 28 (however a right for court to disregard avoidance was given in s 31, see below).

²⁶³⁵ See Ch 4.

insured house, that may be to obtain the real proportion of the price from the insurer, since insurers tend to decrease the amount of the claim paid.²⁶³⁶ Hence, discretion can be given to courts or the IVDRC to follow such approach instead of avoidance if the deliberate or reckless misrepresentation was minor, or can be justified, or if the remedy provides more fairness to the assured.²⁶³⁷ Since the misrepresentation is deliberate, courts would deal with it with little sympathy and try to remedy the situation at the minimum standards. Accordingly, the argument of leniency in dealing with dishonest behaviours does not apply.²⁶³⁸ It must be remembered that one of the reasons for the legal reforms was that avoidance as a remedy was harsh and disproportionate.²⁶³⁹ Therefore, in some instances there must be a degree of flexibility to provide fairness, and that it is where the role of courts appears.

²⁶³⁶ This is similar to legal proceedings where it is a standard practice to demand more to get the approximate price needed, since the demands usually will be reduced.

²⁶³⁷ It must be noted that a right to disregard avoidance when it seems harsh and unfair in the event of fraudulent misrepresentation is given to court by the Australian Insurance Contracts Act (Cth) 1984, s 31, where the assured will be entitled to recover the claim or part of it at the discretion of the court where it is just and fair to do so. However, such approach was denied by the LCCP2007 para 4.50-4100; 4.182, since it seems to be a generous remedy for dishonesty.

²⁶³⁸ Ibid.

²⁶³⁹ See LCCP2007 prt 2.

7.4.2 Post-Contractual Remedies

As stated earlier, the remedy in English insurance law for breaching the post-contractual duty of good faith generally seems to be *avoidance ab initio*,²⁶⁴⁰ while the remedy for breaching the post-contractual duty of good faith generally in Saudi insurance laws is not clear as it is the case for breaching the pre-contractual duty, even though some remedies are provided by the IVDRC for non-innocent breaches.²⁶⁴¹ The author earlier suggested damages as a general remedy for breaching the duty of good faith in general, and the IVDRC can add other remedies depending on the situation.²⁶⁴² However, for the evident violations of breach such as misrepresentation, fraudulent claims and late claim payment, they will have special remedies stipulated in the laws and regulations which will be applied. The general remedy will be applied for situations which are not covered by special remedies.²⁶⁴³ Therefore, discussion in this section will concentrate on the special remedies on late claim payment and fraudulent claims.

I Late Claim Payment:

Similar to the ICOBS in the FCA rules,²⁶⁴⁴ the IMCOCR2008 in Saudi Arabia already incorporates numerous guidelines for insurers about investigating claims fairly and promptly, paying them on a reasonable time, etc.²⁶⁴⁵ For the consequences of breaching those

²⁶⁴⁰ See above under 7.3 ; See Ch 5 under 5.9.

²⁶⁴¹ See above 7.3; See Ch 5 under 5.9.

²⁶⁴² See above.

²⁶⁴³ See above.

²⁶⁴⁴ See ICOBS 8.1.1. & ICOBS 8.1.2.

²⁶⁴⁵ Art 56 IMCOCR2008.

guidelines, article 10 provides that non-compliance with regulations will be a breach of licencing conditions and can subject the insurer to an enforcement action. In a similar fashion, in England violating the ICOBS is considered a breach of a statutory duty which will subject the insurer to disciplinary action.²⁶⁴⁶ However, an assured in English law may have a right for damages against the insurer for breaching such statutory duties, by section 150 of the FSMA2000 which is now replaced by section 138D of the Financial Services Act 2012,²⁶⁴⁷ but this is rarely used by consumers, who usually resort to the FOS which can apply what is “*fair and reasonable in all the circumstances*” and can hear small business insurance cases as well.²⁶⁴⁸ Such right of damages for breaching a statutory duty is not evident under Saudi insurance laws.

Remedies for breaching statutory duties aside, in English common law, the assured currently is entitled to the claim amount and interest in cases of the insurer’s delay in paying the claim but not damages.²⁶⁴⁹ The reforms suggested offering damages for late payments by the insurer, provided that they compensate actual and foreseeable loss after re-characterising the obligation on the insurer to be to pay the claim in a reasonable time.²⁶⁵⁰ After issuing the draft clauses of the Insurance Contract Law Draft Bill, such damages can be possible as additional

²⁶⁴⁶ FSMA2000, s 66.

²⁶⁴⁷ Financial Services Act 2012, sch 18, prt 1, s 12; provided the claimant is a ‘private person’.

²⁶⁴⁸ See above under 7.2.

²⁶⁴⁹ See above; see the rule in *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd’s Rep IR 111 where it was held that there cannot be payment of damages to damages; however there can be some limited damages for distress and inconvenience.

²⁶⁵⁰ See above under 7.2.2.1; this will be an application to the normal contractual principles (*Hadley v Baxendale* (1854) 9 Ex 341).

and distinct remedies to paying the claim and interest as the draft Bill classifies the duty as an implied term under the insurance contract.²⁶⁵¹

Such types of damages could be adopted in Saudi Arabia, especially given that they coincide with Islamic law, which does not allow recovery from consequential unforeseeable damages; damages must compensate actual and foreseeable loss.²⁶⁵² Such a solution seems to be fair, since it provides assureds, who are the real sufferers of the insurer's breach, with compensation for their losses.²⁶⁵³ It is also practised already by the IVDRC for non-innocent breaches by the insurer where the payment of the insurance claim is awarded if it satisfies the conditions together with any damages against any harm and expense incurred by the assured.²⁶⁵⁴ Therefore, a statutory effect to the damages for late claim payment will provide the remedy with more clarity and confirmation and will widen its scope to include any late payment even innocent. In addition, a remedy in damages for late claim payment is already provided by the UCMIP which confirms the right of damages to the beneficiary for incurred loss of the vehicle resulting from delays in settling the claim without acceptable excuse.²⁶⁵⁵ Therefore the suggestion will give such damages more general effect to be applied to different types of policies.

²⁶⁵¹ Insurance Contract Law Draft Bill, cl 13 (1), (5).

²⁶⁵² C. Childress 'Saudi Arabian Contract Law: A Comparative Perspective' (1990) 2 St Thomas L F 69, 85; P. Slone, 'The Status of Islamic Law in the Modern Commercial World' (1988) 22 Int'l L 743, 746.

²⁶⁵³ See above, for justifications for providing damages in such situation.

²⁶⁵⁴ See above; Interview with IVDRC members, IVDRC (Saudi Arabia, 9 Jan 2013).

²⁶⁵⁵ Art 8 (6) UCMIP.

II Fraudulent Claims:

In Saudi insurance laws, the remedies for fraudulent claims by the assured are not clear. The AFR2008 provides fraudulent claims as an example of fraud by the assured,²⁶⁵⁶ and provides measures that must be applied by insurance companies to decrease this type of fraud.²⁶⁵⁷ However, no remedies are mentioned for insurers who suffered from fraud by the assured. Instead, as stated earlier, the AFR2008 under the section concerning fraud by the assured obliges the insurer to inform the assured about its anti-fraud policies and the consequences of giving any false or inaccurate information.²⁶⁵⁸ In practice, as mentioned earlier, the IVDRC provides that in cases of non-innocent breaches of good faith by the assured, the assured or the beneficiary's insurance claim will be dropped or forfeited as fraud vitiates the contractual relationship if proved.²⁶⁵⁹ However, there is unclarity regarding the previous claims if they are affected or not, the fate of the insurance policy, the right of terminating the policy, and subsequent claims.²⁶⁶⁰ The same remedy was provided by the UCMIP, when the assured's claim is fraudulent.²⁶⁶¹

The author recommends that remedies in case of fraudulent claims are to be embedded in Saudi insurance laws. Giving the insurer the freedom to stipulate what they want without any limits may tip the scale too far in favour of the insurer especially regarding consumer

²⁶⁵⁶ Art 45 (b) AFR2008.

²⁶⁵⁷ Art 48–53 AFR2008.

²⁶⁵⁸ Art 51 AFR2008; See above for more details.

²⁶⁵⁹ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

²⁶⁶⁰ Ibid; See above under 7.3.

²⁶⁶¹ UCMIP, Art 8(7).

assureds who have no special protection such as the UTCCR1999 in England. True, one cannot be that sympathetic to a fraudulent assured, but one must bear in mind that the assured's position in the contract is much weaker than the insurer's. If the situation was reversed, and the assured was faced with fraud by the insurer in any form with a legal vacuum regarding remedies, he would be deprived of any rights or remedies. The consumer assured usually cannot negotiate to impose suitable remedies in case of insurer's fraud, to include them in the contract.

In respect of the nature of the remedies available for the insurer, the author suggests avoidance of the contract with refusing all claims, for both Saudi and English insurance laws. However, court discretion can be given to offer an alternative remedy, i.e. the forfeiture of the fraudulent claim and subsequent claims, while not affecting previous claims²⁶⁶² when the fraud is minor, or if it is more just do so. In this case it seems fair to give the insurer the right to terminate the contract as well, as he may not want to continue the contract with a fraudulent assured. Also, the author suggests that the insurer will have the right for damages compensating fraud investigation in both situations. The author views having the forfeiture of the fraudulent claim without affecting the previous claims as the main remedy as the situation currently is in English common law, suggested by the LCCP2011 and adopted by the Insurance Contract Law Draft Bill issued recently²⁶⁶³ as lenient to a certain extent with such conduct. In other words, it does not send the public a strong message of disapproval of this immoral behaviour. The LCCP2011 itself admitted that such a remedy does not act as a deterrent for fraud by the assured, and that is why it suggested damages to be payable by the assured for the costs of fraud investigation by the insurer, as a restrictive remedy for the

²⁶⁶² This is similar to the suggestion in the LCCP2011 which proposed it as the main and only remedy; LCCP2011 para 8.17.

²⁶⁶³ See above, under 7.2.2.

assureds' fraudulent claims.²⁶⁶⁴ However, the author does not believe that such damages can restrict fraudulent claims.²⁶⁶⁵ Such damages are limited and must satisfy stringent conditions namely: they must be actual, reasonable, and proportionate and cannot be offset from the saving from the forfeiture of the valid claim, which make them hard to recover.²⁶⁶⁶ Further, even if such damages are recovered, they do not provide a strong deterrent for assureds compared to avoidance. Instead, such damages compensating the costs of fraud investigation should be available on top of avoidance with the same conditions, to give even a stronger deterrent for fraud by the assured. Fraud can be expensive to prove, and it is just fair to burden the assured with the costs of his fraudulent conduct.

In addition, adopting such a remedy for fraudulent claims by assureds will lead to a strange result in English insurance law, considering the remedies available for deliberate misrepresentation in the CIA2012.²⁶⁶⁷ The CIA2012 provides avoidance and refusal of all claims for any deliberate misrepresentation, and this was justified by public policy arguments and to show the intolerance of such behaviour.²⁶⁶⁸ On the other hand, fraudulent claims by the

²⁶⁶⁴ See above under 7.2.2; LCCP2011 para 8.20.

²⁶⁶⁵ In fact such damages were not provided by the Insurance Contract Law Draft Bill and one of the reasons was that such damages do not act as a real deterrent for fraud; *Butler and Merkin's Reinsurance Law*; The Law Commission And Scottish Law Commission, *Reforming Insurance Contract Law: Initial Draft Clauses* (Jan 2014) found in <http://lawcommission.justice.gov.uk/docs/insurance_stakeholder_notes_January2014.pdf> accessed in 28 March 2014, para 3.29.

²⁶⁶⁶ See LCCP2011 paras 8.19–8.23.

²⁶⁶⁷ CIA2012, sch 1, prt 1, para 2.

²⁶⁶⁸ CIA2012, sch1, prt 1, para 2.; LCCP2007 paras 4.50–4.99; LCCIL2009 para 6.16; See above.

assured contain more clear immorality compared to deliberate misrepresentation. In fraudulent claims, the assured is clearly claiming profit which he is not entitled to by bluntly making a false claim, but this direct manner is less evident in deliberate misrepresentation, where the assured gives false facts, relying on the hope that the insurer will consider them and therefore the assured can benefit in some way e.g. a reduction in premium. Hence, rejecting avoidance of the contract in fraudulent claims and accepting it in deliberate misrepresentations seems rather illogical and contradictive. The social message contained in the remedy for fraud in insurance claims must be at minimum as strong as deliberate misrepresentation, if not stronger.

In respect of Saudi insurance law, the remedy of avoidance corresponds with Islamic contract law, which provides the choice of such a remedy for the defrauded party in case of fraud.²⁶⁶⁹ This can be beneficial to Saudi insurance laws, since they will be much closer to general contract law, which is a favourable approach. Fraud cases in general courts can be used as a guide for the IVDRC.²⁶⁷⁰

²⁶⁶⁹ See also Ch 4 for more.

²⁶⁷⁰ It is worth noting that in Islamic contract law, fraudulent acts can annul the contract, but must be accompanied by *ghubn*, which does not need to be excessive. Nonetheless, fraudulent statements must be associated with excessive *ghubn* for the defrauded party to void the contract; See Ch 4.

7.5 CONCLUSION

It can be concluded that the legal remedies available for the parties of the insurance contract when one of them breaches good faith or does not take reasonable care not to make a misrepresentation vary in the current state of English insurance law. It must be noted that consumer assureds are now governed by the CIA2012 instead of the MIA1906, while business assureds are still governed by the MIA1906.²⁶⁷¹ In respect of the pre-contractual remedies, for business insurance, the duty of good faith is still retained by the MIA1906, and avoidance is the sole remedy which can be used by either party when it is breached, and premiums are returned except in case of fraud.²⁶⁷² For consumer insurance, the duty of good faith is removed for the pre-contractual period and the insurer will have a remedy after abolishing the duty of disclosure only against qualifying misrepresentations which can be deliberate or reckless, or careless. Avoidance and refusing all claims is retained in the CIA2012 for deliberate or reckless misrepresentations with the insurer retaining the premium unless it is unfair to the assured.²⁶⁷³ Nonetheless, a proportionate remedy is offered for consumer's careless misrepresentations.²⁶⁷⁴

For business assureds, the LCCP2012 suggests avoidance, refusal of all claims and retaining the premium for dishonest conduct, and a proportionate remedy for non-dishonest conduct.²⁶⁷⁵ Also it suggests retaining the duty of good faith only as an interpretive principle

²⁶⁷¹ See above under 7.2.

²⁶⁷² See above under 7.2.1. ; MIA1906, s 17.

²⁶⁷³ Ibid, CIA2012, sch1, prt 1, para 2.

²⁶⁷⁴ Ibid, CIA2012, sch 1, prt 1, para 3.

²⁶⁷⁵ Ibid.

with no remedies of its own, and having it as a shield rather than a sword.²⁶⁷⁶ Such suggestions are adopted in draft clauses of the Insurance Contract Draft Bill issued recently, which define dishonest breaches of the duty to make a fair presentation of the risk as deliberate or reckless breaches, and non-dishonest breaches as neither deliberate nor reckless breaches.²⁶⁷⁷

The breach of the ICOBS which contains various disclosure duties on the insurer and the intermediary and duties in respect of handling the claims can give the assured the right for damages under the FSMA2000 provided it is a ‘private person’.²⁶⁷⁸ However, consumers rarely use such right in practice as they usually resort to the FOS which applies what is “*fair and reasonable in the circumstances*”, and can hear small business insurance cases as well.²⁶⁷⁹ The approach of the FOS is mostly adopted by the CIA2012.²⁶⁸⁰ Also, the breach can incur a disciplinary action on the insurer.

For post-contractual breaches, the general remedy currently seems to be avoidance *ab initio* for both consumer and business insurance.²⁶⁸¹ For fraudulent claims, the current state of English common law is that the fraudulent claim is to be forfeited and the reforms suggest making that statutory with forfeiting subsequent claims, and suggest offering damages for the

²⁶⁷⁶ Ibid.

²⁶⁷⁷ Ibid.

²⁶⁷⁸ See above under 7.2.

²⁶⁷⁹ Ibid.

²⁶⁸⁰ Ibid.

²⁶⁸¹ See above under 7.2.2.

insurer for fraud investigation costs.²⁶⁸² Such remedies are adopted recently by the draft clauses of the Insurance Contract Law Draft Bill, but damages for fraud investigations costs are not included.²⁶⁸³ For delays in claim payment by the insurers, the common law position is that the assured is entitled to the claim amount plus interest and damages are refused.²⁶⁸⁴ The reforms suggest re-characterising the insurer's duty to be to pay the claim in a reasonable time with damages paid in case of breach.²⁶⁸⁵ The draft clauses of the Insurance Contract Law Draft Bill has characterised the duty to pay the insurance claim in a reasonable time as an implied term in every insurance contract, and its remedies such as damages will be additional and distinct from the remedies of paying the claim and interest.²⁶⁸⁶

That can be contrasted with the position of Saudi insurance laws, which is far from clear regarding the remedies available when breaching good faith. The duty of good faith in the IMCOCR2008 is imposed on the insurer and only provides that the breach is considered a breach of a statutory duty incurring a disciplinary action but not damages, which is not of any benefit to the assured.²⁶⁸⁷ However, the practice of the IVDRC confirms that the duty of good faith is mutual and expected from either party and provides some remedies for breach, namely: dropping or forfeiting the insurer's claim for the non-innocent breaches by the assured and paying the claim provided it satisfied its conditions, with damages for the non-

²⁶⁸² Ibid.

²⁶⁸³ Ibid.

²⁶⁸⁴ Ibid.

²⁶⁸⁵ Ibid.

²⁶⁸⁶ Ibid.

²⁶⁸⁷ See above under 7.3.

innocent breach by the insurer.²⁶⁸⁸ In Saudi Arabia, insurers can stipulate their own remedies for assureds fraudulently committing misrepresentation, but must inform the assureds about those remedies and about their anti-fraud policies.²⁶⁸⁹ Recommendations to include clear remedies in insurance laws in one place, such as the IMCOCR2008, are encouraged.²⁶⁹⁰

The author suggests some changes in respect of the remedies available for the parties when breaching good faith in insurance contracts particularly to develop Saudi insurance laws.²⁶⁹¹ Firstly, consumer and business assureds should have the same regime and protection and the duty of disclosure should be abolished as discussed in chapter 5.²⁶⁹² For the duty of good faith, the author favours its existence in Saudi insurance laws, with damages suggested as a general remedy for breach, with discretion to the IVDRC to add any other remedies depending on the nature of breach and the circumstances.²⁶⁹³ However, it is suggested that the most evident violations of the duty, e.g. misrepresentations, fraudulent claims and late payment of the claim are to be included by special remedies in the laws and regulations.²⁶⁹⁴ The general remedy will apply only to incidents not covered by the special remedies.²⁶⁹⁵ For misrepresentations, having no remedies for the insurer when the assured takes reasonable care

²⁶⁸⁸ Ibid.

²⁶⁸⁹ Ibid.

²⁶⁹⁰ Ibid.

²⁶⁹¹ See above under 7.4.

²⁶⁹² See Ch 5.

²⁶⁹³ See above under 7.4.

²⁶⁹⁴ Ibid.

²⁶⁹⁵ Ibid.

in not making a misrepresentation, as provided by the CIA2012 is strongly appreciated, while in careless misrepresentation the proportionate remedy provided by the CIA2012 and the LCCP2012 for non-dishonest conducts and the draft clauses of the Insurance Contract Law Draft Bill for neither deliberate nor reckless breaches is not favoured.²⁶⁹⁶ Instead, the author suggests awarding damages for careless misrepresentation.²⁶⁹⁷ In respect of deliberate or reckless misrepresentation, avoidance as provided in CIA2012 and in the LCCP2012 for dishonest conduct which is recently adopted in the Insurance Contract Law Draft Bill for deliberate or reckless breaches is welcomed.²⁶⁹⁸ However, court discretion to disregard avoidance and provide alternative remedies such as paying the claim or part of it is suggested in some circumstances.²⁶⁹⁹ For delays in claim payment by the insurer, the author favours the English suggested reforms, and the IVDRC approach in awarding damages, while for fraudulent claims by the assured, the author disagrees with the English position which offers the forfeiture of the fraudulent claims without affecting the previous valid claims as the main remedy.²⁷⁰⁰ As an alternative, the author recommends avoidance of the whole contract as a more logical remedy for fraudulent claims by assureds with court discretion to offer an alternative remedy, by the forfeiture of the fraudulent claim and subsequent claims if the fraud is minor or if it provides more fairness.²⁷⁰¹ The right to terminate is suggested in the latter case, with damages compensating fraud investigation suggested for both cases.

²⁶⁹⁶ Ibid.

²⁶⁹⁷ Ibid.

²⁶⁹⁸ Ibid.

²⁶⁹⁹ Ibid.

²⁷⁰⁰ Ibid.

²⁷⁰¹ Ibid.

As a final remark, when articulating the legal remedies one must bear in mind a few points to avoid falling into the criticisms that have been directed against the MIA1906. Firstly, the remedy must be proportionate with the breach; not too harsh, but not too lenient. Also, it must be easy for courts to apply and not involve complex assessments which depend purely on subjective measures, or imaginary situations or hypotheses. Finally, the remedy should be logical and not contradict with other remedies provided for other breaches, and that is why it is favourable to place those remedies in one place, to get a clear picture of each breach and its remedy.

Now that the remedies of breaching the duty of good faith have been discussed thoroughly, in the next chapter the author will try to summarise the points discussed and develop general recommendations for improving the insurance legal system in Saudi Arabia.

CHAPTER 8

CONCLUSION

8.1 CONCLUSION

The duty of good faith in Saudi insurance law is a concept which is yet to be developed and comprehended by regulators and legal professionals. This development can be difficult, as the legal background where such duty has evolved within insurance still doubts the admissibility of the insurance contract itself.²⁷⁰² It is fair to say that the arguments for insurance prohibition in Islam, with their many contradicting views, still cast a dark shadow on the insurance industry and regulation in Saudi Arabia. Even after the promulgation of the LSCIC2003, such views seem to continue to have their way in affecting the stability of the insurance system, law, and enforcement. A summary of the main issues of discussion will be provided, highlighting the main recommendations for Saudi insurance laws in particular regarding the duty of good faith, disclosure and honest representation. That will be followed by general suggestions to improve Saudi insurance laws and the regulation of the insurance industry.

This thesis has argued that the insurance contract in Islam is admissible, and nothing forbids it.²⁷⁰³ The allegations of *riba*, *gharar*, and gambling seem not to survive as claims for prohibition.²⁷⁰⁴ The field is always open for new contracts to be created in Islamic law under the doctrine of free interest, and since the original state of things is admissibility.²⁷⁰⁵ Within the diverse views of insurance in Islam, the view only allowing cooperative insurance and prohibiting commercial insurance is that adhered to in Saudi Arabia by an official *fatwa*.²⁷⁰⁶

²⁷⁰² See Ch 2, Ch 3.

²⁷⁰³ See Ch 2.

²⁷⁰⁴ Ibid.

²⁷⁰⁵ Ibid.

²⁷⁰⁶ See Ch 3.

Nonetheless, the author discussed that there is no genuine difference between the two methods, as they are both admissible means for conducting insurance in Islam.²⁷⁰⁷

Before activating the official *fatwa* allowing only cooperative insurance by promulgating the relevant insurance laws, insurance in Saudi Arabia was operating without any official laws or regulations other than the CCL1931, which is not applicable in practice.²⁷⁰⁸ Insurance contracts were enforced through internal procedures by the Ministry of Commerce, in a more administrative than judicial method.²⁷⁰⁹ This chaotic situation resulted in the loss of assureds' rights and investments, and a duality in the legal system generating from the operation of a conventional insurance system under the umbrella of *Sharia'a* law.²⁷¹⁰ After the announcement of the LSCIC2003, which came to Islamise all insurance practices in Saudi Arabia, and remove the legal duality, it seems that another type of legal duality was formed. This thesis argued that the LSCIC2003, although improving the regulation of insurance dramatically, did not genuinely stop conventional insurance from operating.²⁷¹¹ Hence, a regulated conventional insurance system, tagged as cooperative or Islamic, was trying to operate within the parameters of Islamic law as the supreme legal system in the country.²⁷¹² In respect of enforcing insurance contracts after the LSCIC2003, the IVDRC was assigned to hear insurance cases in the first instance, while the Board of Grievance was assigned to hear

²⁷⁰⁷ See Ch 2.

²⁷⁰⁸ See Ch 3.

²⁷⁰⁹ Ibid.

²⁷¹⁰ Ibid.

²⁷¹¹ Ibid.

²⁷¹² Ibid.

the appealed cases.²⁷¹³ Nonetheless, supporting the author's former argument, the jurisdiction of the appealed cases was removed from the Board, as judges who are part of the main judicial system abiding to Islamic law were found in a critical position, owing to the fact that they were viewing conventional, not cooperative, insurance cases.²⁷¹⁴ The jurisdiction was passed to the IAC, which, together with the IVDRC, were excluded from the new JL2007, which merged many of the semi judicial committees into the main judicial system.²⁷¹⁵ That adds further evidence to the conventional nature of the insurance practiced under the LSCIC2003.

Against this background, the duty of good faith, including disclosure and honest representation, in Saudi insurance law has emerged under the LSCIC2003 and the IMCOCR2008. However, the duty was not a novel concept, as with English Insurance law, given that unlike English general contract law, good faith is required in Saudi general contract law, i.e. Islamic law, in every aspect of the transaction.²⁷¹⁶

It is fair to say that the exploitation by insurers of the chaotic circumstances before the LSCIC2003 had its impact on the formation of the duty of good faith and its application in disclosure and honest representation in Saudi insurance laws embedded in the LSCIC2003 and the IMCOCR2008.²⁷¹⁷ Most insurance laws and regulations in Saudi Arabia came to be more assured-friendly, in an attempt to gain the trust of the assureds in the market.²⁷¹⁸ That is

²⁷¹³ Ibid.

²⁷¹⁴ Ibid.

²⁷¹⁵ Ibid.

²⁷¹⁶ See Ch 4.

²⁷¹⁷ See Ch 3, Ch 5.

²⁷¹⁸ See Ch 5.

something which cannot be said about English insurance laws, where insurers are the ‘players of the game’ and powerful enough to dominate the approach of insurance laws towards a more insurer-friendly approach. Another influencing factor in the formation of the duty of good faith in both laws is the difference in the aspirations of the insurance laws, as where the English laws aspire to economic efficiency; Saudi laws aspire to the adherence of the precepts of Islam.²⁷¹⁹ Therefore, where the duty was a unique feature in English insurance law, it was just a natural extension of its application to all contracts in the Saudi system. The major difference between the two insurance systems is the materiality test used to assess what information must be disclosed by the assured.²⁷²⁰ The IMCOCR2008 adopts a reasonable expectations test based on what a reasonable person would expect to be relevant to disclose, while the MIA1906 for business assureds adopts a prudent insurer test based on the decision of the prudent insurer to take the risk or charge a higher premium had he known the disclosed or true facts.²⁷²¹ Nonetheless, the position for consumer assureds in English insurance law has improved after the CIA2012 abolished the duty of disclosure completely and set that only qualifying misrepresentation can give a remedy to the insurer.²⁷²² The author recommended that a similar approach be adopted by the IMCOCR2008.²⁷²³ It was discussed that the reasonable expectations test adopted by the IMCOCR2008 cannot work because of certainty and predictability issues, not matching the objectivity of Islamic law, inaccuracy regarding business assureds, and the incurring of more costs to conclude insurance.²⁷²⁴ On the other

²⁷¹⁹ See Ch 5, Ch 4.

²⁷²⁰ Ibid.

²⁷²¹ See Ch 5.

²⁷²² Ibid.

²⁷²³ Ibid.

²⁷²⁴ Ibid.

hand, the LCCP2012 retained the duty of disclosure as a default rule, where the business assured is bound to disclose all material information necessary to provide a fair presentation of the risk, and information which could be discovered by the insurer making reasonable enquiries.²⁷²⁵ The insurer in its turn must promptly ask any reasonable questions about such information, otherwise no remedies will be available.²⁷²⁶ However, the materiality test did not change. The draft clauses of the Insurance Contract Law Draft Bill issued recently provides that the non-consumer proposer has a duty to make a fair presentation of the risk and such duty consists of disclosure of all material information, the way of such disclosure , and refraining from misrepresentation. The draft clauses adopt the same materiality test in the MIA1906 for the non-consumer assured with slight modification which removes “*in fixing the premium*” in the test and adds “*if so, on what terms*”.²⁷²⁷

A positive point about the IMCOCR2008, though, is that it does not distinguish between consumer and business assureds by articulating different regimes. The author suggested that English insurance laws, adopt a similar approach.²⁷²⁸ The general duty of good faith is almost one sided in the IMCOCR2008, as it seems to be announced only regarding the insurers, reflecting an assured-friendly approach; however, it was argued that such duty is required from the assured in practice by the IVDRC. On the other hand, even the duty in the MIA1906 is clearly mutual; it is not much of a benefit as the only remedy is avoidance, which is not beneficial to the business assured.²⁷²⁹

²⁷²⁵ Ibid.

²⁷²⁶ Ibid.

²⁷²⁷ Ibid.

²⁷²⁸ Ibid.

²⁷²⁹ Ibid.

The assured's state of mind, and his knowledge when committing non-disclosure or misrepresentation, seem to play no role in the MIA1906, even though they play a considerable role in the CIA2012, the LCCP2012, the Insurance Contract Law Draft Bill, the AFR2008 and the IVDRC.²⁷³⁰ However, an inducement requirement is only evident in English insurance law, since the insurer here is the point of reference.²⁷³¹

For the duration of the duty of good faith, it seems that it can generally extend after the conclusion of the contract and end when the legal proceedings commence in English insurance law.²⁷³² The scope and nature of the post-contractual duty of good faith are less clear, and the availability of avoidance *ab initio* as the only remedy for breach makes courts avoid labelling the duty as similar to the one in section17 of the MIA1906,²⁷³³ where it seems that in Saudi insurance laws, the duty is also needed on the pre- and post-contractual stage aspiring to Islamic principles at all times,²⁷³⁴ however, the general remedy for breaching the post-contractual duty is not clear. As for fraudulent claims they are to be treated separately from good faith in English insurance law and the remedy in common law which is recently codified in the Insurance Contract Law Draft Bill is the forfeiture of the fraudulent claim as the insurer will not be liable to it. The draft clauses also provide that the contract can be terminated by the insurer from the time of the fraudulent act by a notification to the assured, and when it is, the insurer will not be liable to all subsequent events to the fraudulent act, and

²⁷³⁰ Ibid.

²⁷³¹ Ibid.

²⁷³² Ibid.

²⁷³³ Ibid.

²⁷³⁴ Ibid.

the premiums will not be returned.²⁷³⁵ On the other hand, in Saudi Arabia, it seems that fraudulent claims can be considered a breach of good faith in the practice of the IVDRC, and the remedy will be the forfeiture of the insurance claim.²⁷³⁶ For late payment of claims by the insurer, even it can be considered a breach of good faith in English insurance law, that will not be beneficial since the only remedy is avoidance, while in Saudi Arabia damages can be awarded under the UCMIP, and it can be considered a breach of good faith in the practice of IVDRC, where if it was considered a non-innocent breach, damages can be awarded, and the insurer has to pay the claim provided it satisfied its conditions.²⁷³⁷ However, the English position is subject to change after the draft clauses of the Insurance Contract Law Draft Bill issued recently which provide that the remedies for breaching the implied term in every insurance contract to pay the sums due to the assured in reasonable time, such as damage, will be different and additional to other remedies like paying the insurance claim or interest.²⁷³⁸

Disclosure can be waived by the insurer in English insurance law.²⁷³⁹ Moreover, the insurer will carry the burden to prove any material misrepresentation or non-disclosure by the business assured, which induced him into the contract. In the draft clauses of the Insurance Contract Law Draft Bill issued recently, the insurer will carry the burden to prove that the qualifying breach of the duty to make a fair presentation of the risk by the non-consumer assured is deliberate or reckless.²⁷⁴⁰ While in the CIA2012, the insurer will carry the burden

²⁷³⁵ Ibid.

²⁷³⁶ Ibid.

²⁷³⁷ Ibid.

²⁷³⁸ Ibid.

²⁷³⁹ Ibid.

²⁷⁴⁰ Ibid.

to prove that the qualifying misrepresentation of the consumer assured is deliberate or reckless, but such misrepresentation is presumed, except if it was proved otherwise, subject to certain conditions.²⁷⁴¹ Nonetheless, in Saudi insurance laws issues of waiver and burden of proof are faced with a legal gap. The IMCOCR2008 refers to the suitable best practices accepted internationally regarding legal gaps in insurer's duties.²⁷⁴² The author, however, defends the application of the general contract law in case of a legal vacuum.²⁷⁴³

There is a need for more clarity and transparency in laws surrounding the insurance intermediaries and their performance of duties, in both English and Saudi systems.²⁷⁴⁴ Such clarity is needed to determine the imputation of information and omissions, whether on the insurer or the assured. The role of the intermediaries in concluding insurance is significant, as many insurance operations are conducted by them, to the extent that the actual assured seem to be excluded.²⁷⁴⁵ What is found is that there is a general duty of honesty and fairness placed on the intermediary in Saudi insurance laws, which is not found in the same way in English insurance laws.²⁷⁴⁶ In English insurance laws, liability incurs only on the placing broker, and the broker is commonly the assured's agent other than in certain circumstances. These circumstances include being the insurer's appointed representative and can include independent brokers having the authority to bind cover but even though that may not be at all

²⁷⁴¹ Ibid.

²⁷⁴² Ibid.

²⁷⁴³ Ibid.

²⁷⁴⁴ See Ch 6.

²⁷⁴⁵ Ibid.

²⁷⁴⁶ Ibid.

times. For the status of single and multi-tied agents, the matter is inconsistent.²⁷⁴⁷ The CIA2012; however, made some presumptions on the issue of classifying the intermediary as an agent of the assured or the insurer which are not decisive.

In Saudi insurance laws, it is unclear on which broker the liability will incur whether the placing broker or otherwise; however, there is a distinction between the term ‘brokers’ as the assureds’ agents who conduct insurance services for the assured with the insurer, and ‘agents’ as the insurers’ agents who represent the insurer in conducting insurance including single and multi-tied agents.²⁷⁴⁸ When filling in the proposal forms, insurance intermediaries under English common law are considered the assureds’ agents even if they are normally the insurers’ agents, and similarly in Saudi Arabia an approach of strict liability towards the answers in the forms is adopted towards the assured.²⁷⁴⁹

In respect of disclosure, the intermediary, under the MIA1906, is obliged to disclose what the assureds have to disclose, plus any material information known by him or should be known to him, or the policy can be avoided.²⁷⁵⁰ In contrast, Saudi insurance law does not require an independent duty of disclosure on the intermediary and only requires disclosure regarding what the assured is required to disclose, which the author argued to be a favourable approach.²⁷⁵¹ The LCCP2012, tried to improve the position for business assureds by proposing to incur liability on the whole chain of intermediaries, bind the intermediary by the information which he withheld in his capacity as an agent for that particular business assured

²⁷⁴⁷ Ibid.

²⁷⁴⁸ Ibid.

²⁷⁴⁹ Ibid.

²⁷⁵⁰ Ibid.

²⁷⁵¹ Ibid.

and any information he avoided to possess in a deliberate manner.²⁷⁵² Additionally, the LCCP2012 proposes that a remedy against the business assured must be provided in case of the failure by his broker to make reasonable enquiries on his behalf and to disclose matters which could have been revealed by such reasonable enquiries proportionate with the circumstances of the insurance conducted.²⁷⁵³ Finally, the LCCP2012 proposes the abolishment of section 19 (b) of the MIA1906.²⁷⁵⁴ Those reforms are adopted by the draft clauses of the Insurance Contract Law Draft Bill as discussed earlier.

Both systems require other aspects of disclosure on the intermediary.²⁷⁵⁵ The RII2011 requires other kinds of disclosure, such as disclosure of commission, but it was argued that the real benefit of these disclosures is a matter of question.²⁷⁵⁶ The FSMA2000 in its ICOBS, in addition to requiring commission disclosure only if requested by commercial customers, requires disclosure of the intermediary's legal status and scope of service, which was discussed a positive approach but must be supported by an explanation of what the implications are of providing such scope of service, and must include disclosure of commission for all categories of assureds.²⁷⁵⁷

The legal remedies available for the insurance parties in the case of violation of good faith must be proportionate with the remedy, easy to apply – not involving complex assessments –

²⁷⁵² Ibid.

²⁷⁵³ Ibid.

²⁷⁵⁴ Ibid.

²⁷⁵⁵ Ibid.

²⁷⁵⁶ Ibid.

²⁷⁵⁷ Ibid.

and not contradict with other remedies for other breaches.²⁷⁵⁸ By looking at those remedies in English insurance law, one can discern that such parameters are absent. Avoidance provided by the MIA1906 which applies now only to business insurance, as the sole remedy for any violation by the parties, even minor or innocent, is clearly an example of a non-proportionate remedy for the breach.²⁷⁵⁹ Nonetheless, the situation has improved with the promulgation of the CIA2012 which applies to consumer insurance, in which the duty of disclosure is abolished, the duty of good faith is removed, and only qualifying misrepresentation incurs a remedy which can be deliberate or reckless, or careless. Avoidance under the CIA2012 is retained only in deliberate and reckless misrepresentation for consumer assureds; this is followed also by the suggestions for business assureds in the LCCP2012 for dishonest conduct which are adopted in the draft clauses of the Insurance Contract Law Draft Bill issued recently for non-consumer insurance for deliberate or reckless breaches of the duty to make a fair presentation of the risk.²⁷⁶⁰ On the other hand, a proportionate remedy is provided for careless misrepresentation in the CIA2012 and proposed for all non-dishonest breaches for business assureds according to the LCCP2012 and which has been adopted recently by the Insurance Contract Law Draft Bill for non-deliberate or reckless breaches of the duty to make a fair presentation of the risk.²⁷⁶¹

For the general remedy of breaching the post-contractual duty of good faith, it seems to be avoidance *ab initio* which applies to consumer and business insurance.²⁷⁶² For fraudulent

²⁷⁵⁸ See Ch 7.

²⁷⁵⁹ Ibid.

²⁷⁶⁰ Ibid.

²⁷⁶¹ Ibid.

²⁷⁶² Ibid.

claims, the remedy is that the fraudulent claim is to be forfeited and the reforms suggest making that statutory and suggest offering damages for the insurer for fraud investigation costs.²⁷⁶³ The draft clauses of the Insurance Contract Law Draft Bill issued recently adopt the suggestion that the fraudulent claim is to be forfeited but not the suggestion regarding the payment of fraud investigations costs to the insurer.²⁷⁶⁴

For delays in claim payment by the insurers, the common law position is that the assured is entitled to the claim amount plus interest but not damages, and the reforms suggest offering damages and re-characterising the insurer's duty to be to pay the claim in a reasonable time.²⁷⁶⁵ The draft clauses of the Insurance Contract Law Draft Bill have characterised the duty to pay the claim in a reasonable time to be an implied term in every insurance contract, and its remedies such as damages will be additional and distinct from the remedies of paying the claim and interest.²⁷⁶⁶

When looking at the remedies in Saudi insurance laws, one can see that there are no clear specific remedies which can benefit the assured.²⁷⁶⁷ Similar to English insurance laws, the breach of good faith would be considered a breach of a statutory duty; however, in Saudi Arabia there is no beneficial remedy for such breach as it only incurs a disciplinary action compared to the English position where besides such action, under section 150 of the FSMA2000 which is replaced by section 138D of the Financial Services Act 2012 damages

²⁷⁶³ Ibid.

²⁷⁶⁴ Ibid.

²⁷⁶⁵ Ibid.

²⁷⁶⁶ Ibid.

²⁷⁶⁷ Ibid.

can be claimed for any breach to the duties by the statute.²⁷⁶⁸ All that is indicated in Saudi insurance laws regarding remedies is that insurers are given the right to stipulate the remedies in the case of fraudulent misrepresentation by the assureds by the AFR2008, with a requirement to inform them of these remedies.²⁷⁶⁹ This situation recalls the situation prior to the LSCIC2003, where insurers were the regulators of the contract, which constituted an evident conflict of interest.²⁷⁷⁰ However, the practice of the IVDRC provides some remedies for breaching the duty, namely: dropping or forfeiting the insurance claim for the non-innocent breaches by the assured and paying the claim provided it satisfied its conditions with damages for the non-innocent breach by the insurer. The author suggested articulating more clear remedies to be put in one place to avoid contradiction. These remedies can be embedded in one place, such as the IMCOCR2008 or a newly articulated comprehensive insurance contract law, which is the most favourable approach.²⁷⁷¹

The author also suggests some reforms for both systems and for Saudi insurance laws in particular.²⁷⁷² Firstly, consumer and business assureds should have the same regime and protection, and the duty of disclosure should be abolished.²⁷⁷³ For the duty of good faith, the author favours its existence in Saudi insurance laws, with damages suggested as a general remedy for breach, and discretion given to the IVDRC to add any other remedies depending

²⁷⁶⁸ Ibid.

²⁷⁶⁹ Ibid.

²⁷⁷⁰ See Ch 3.

²⁷⁷¹ Ibid.

²⁷⁷² See Ch 7.

²⁷⁷³ See Ch 7.

on the nature of the breach and the circumstances.²⁷⁷⁴ However, it is suggested that the most evident violations of the duty, e.g. misrepresentations, fraudulent claims and late payment of the claim are to be included by special remedies in the laws and regulations.²⁷⁷⁵ The general remedy will apply only to incidents not covered by the special remedies.²⁷⁷⁶

In respect of misrepresentation, where reasonable care was taken not to commit it, having no remedies, as provided by the CIA2012, is strongly appreciated, while in careless misrepresentation the proportionate remedy under the CIA2012 is not favoured, and which was also suggested by the LCCP2012 for non-dishonest conduct and incorporated in the Insurance Contract Law Draft Bill for deliberate or reckless breaches of the duty to make a fair presentation of the risk. Instead, the author suggests awarding damages for careless misrepresentation. In respect of deliberate or reckless misrepresentation, avoidance as provided in CIA2012 and the LCCP2012 for dishonest conduct and incorporated in the Insurance Contract Law Draft Bill for deliberate or reckless breaches of the duty to make a fair presentation of the risk is welcomed; however, court discretion to disregard avoidance and pay the claim or a proportion of it instead of avoidance is recommended when it may be more suitable and fair to do so.²⁷⁷⁷

For delays in claim payment by the insurer, the author favours the English suggested reforms, the draft Bill and the IVDRC approach in awarding damages, while for fraudulent claims by the assured, the author disagrees with the English position which offers the forfeiture of the

²⁷⁷⁴ Ibid.

²⁷⁷⁵ Ibid.

²⁷⁷⁶ Ibid.

²⁷⁷⁷ Ibid.

fraudulent claim as the main remedy, and the IVDRC approach.²⁷⁷⁸ As an alternative, the author recommends avoidance of the whole contract as a more logical remedy for fraudulent claims by assureds with court discretion to offer an alternative remedy by the forfeiture of the fraudulent claim and subsequent claims if the fraud is minor or if it is more suitable and just to do so.²⁷⁷⁹ The right to terminate is suggested in the latter case, with damages compensating fraud investigation suggested for both cases to deter fraud. It is worth mentioning that the IVDRC suggested that insurance laws are to be reviewed regularly to include more general provisions, as the remedies of violating good faith are not clearly drafted, as in other jurisdictions.²⁷⁸⁰

²⁷⁷⁸ Ibid.

²⁷⁷⁹ Ibid.

²⁷⁸⁰ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

8.2 GENERAL RECOMMENDATIONS TO THE REGULATION OF INSURANCE IN SAUDI ARABIA

8.2.1 Providing Clarity In The Law Relating To Insurance and Its Enforcement

I Amending The CCL1931 With Contemporary Provisions, Or Announcing Its Invalidity Regarding Insurance And Articulating A Comprehensive Insurance Contract Law:

It can be observed that both Saudi and English systems have layers of regulations regulating insurance. The English system used the regulations to resolve the harshness of the law,²⁷⁸¹ while Saudi Arabia used the regulations as more comprehensive contemporary solutions compared to its incomprehensive archaic laws.²⁷⁸² However, in both systems the regulations were used to avoid any changes in the law itself, which does not provide a real solution, and adds confusion to the legal position. Hence, those regulations even did not ‘officially’ substitute the law; they tried to ignore it, and worked their way around it to arrive at a fair or clear result. The UK is addressing the problem with law reform projects to amend the MIA1906 in the areas of good faith, disclosure and misrepresentation, which recently resulted in the CIA2012 for consumer insurance, and the draft clauses of the Insurance Contract Law Draft Bill.²⁷⁸³ Nonetheless, Saudi Arabia still uses the same method, without any intent to

²⁷⁸¹ See for example ICOBS 8.

²⁷⁸² See for example CCL1931, IMCOCR2008.

²⁷⁸³ See LCCP2007; LCCP2011; LCCP2012 ; See draft clauses.

amend the law or to articulate a new insurance contract law. Clarity is surely needed regarding what is applicable and what is not. It is only confusing to have a valid ‘law’ which is assumed to be applicable but in fact is not.

Hence, an amendment to the CCL1931 could provide clarity in insurance laws, which can impact positively on investments, remove any misconceptions, and facilitate law comprehension by international audiences. However, the author believes that announcing the law’s invalidity is a more suitable solution. It must be remembered that the CCL1931 has always been criticised as a law which is not suitable for contemporary needs and contains archaic terms which are not widely understood.²⁷⁸⁴ Its insurance section contains provisions which are not applicable at all in practice, as the LSCIC2003, IMCOCR2008, AFR2008, RII2011, and other regulations, are applied instead. It is also incompatible with the above mentioned laws and regulations, which make it impossible to enforce them without contradiction. Accordingly, what the CCL1931 does really is add more unnecessary confusion to the legal situation with inactive insurance provisions. In fact, although the CCL1931 may have active applicable provisions regarding other sections, e.g. general commercial law and marine law, such provisions need updating and reform. As a whole, it seems that the CCL1931’s inapplicable sections are more numerous than the applicable ones. The inapplicable sections are replaced by other laws and regulations, e.g. Company Law 1965, Commercial Papers Law 1964, while the applicable ones are in urgent need of reform.²⁷⁸⁵

A positive point about the CCL1931, though, is that it aims to govern the insurance contract itself and determine the rights and obligations of the parties. That can be an incentive for articulating a comprehensive insurance contract law which properly regulates the relationship

²⁷⁸⁴ See Ch 3.

²⁷⁸⁵ See Ch 3.

of the parties. The IMCOCR2008, although regulating such a relationship, is not considered an insurance contract law per se, as it is a market conduct regulation which is directed more towards regulating the insurers' behaviours in their course of business.²⁷⁸⁶

II Amending LSCIC2003 To Be A Proper Cooperative/ Islamic Insurance Legislation, To Remove The Legal Duality And Enhance Efficiency And Clarity:

The author has argued that the LSCIC2003 contains provisions which are more for conventional insurance principles than cooperative.²⁷⁸⁷ This created a legal pluralism in the system resulting from the operation of a regulated conventional system tagged as cooperative under the umbrella of *Sharia'a* law, as the supreme law of land.²⁷⁸⁸ This situation is not favoured, as it adds complexity and inefficiency in the legal system regulating insurance.²⁷⁸⁹ In fact, such a situation is similar to the legal duality which existed before the promulgation of the LSCIC2003, where an unregulated conventional insurance system was trying to operate within a prevailing *Sharia'a* law system.²⁷⁹⁰ It seems that the only difference is that the conventional insurance became regulated by the state rather than the insurers, but the principles remain the same. Accordingly, the Saudi legislator is urged to amend the LSCIC2003 to be a genuine cooperative insurance regulation, rather than incorporating

²⁷⁸⁶ Art 1, 2 IMCOCR2008.

²⁷⁸⁷ See Ch 2.

²⁷⁸⁸ Ibid.

²⁷⁸⁹ Ibid.

²⁷⁹⁰ Ibid.

cosmetic solutions. Legal duality can have a negative impact on any system,²⁷⁹¹ and in this case it has already affected the efficiency of the insurance law enforcement mechanisms.

III Organising Insurance Enforcement To Be Under The Main Judicial System, Not Administrative Committees With Semi Judicial Nature:

If the LSCIC2003 were reformed to apply real Islamic insurance concepts, this issue would be resolved, as the judges in the Board of Grievance would be able to review the cases while they are sure that they are dealing with insurance adhering to Islamic principles. What is happening now, as discussed in chapter 3, is that insurance is slipping out of the judicial system after the amendment of article 22 of the LSCIC2003, which removed the Board of Grievance from viewing insurance cases in case of appeals. The justification was to remove the critical position for the Board judges, who must adhere to Islamic law principles.²⁷⁹² Most appealed insurance cases were either rejected or reviewed from the perspective of their conformity with the Islamic insurance principles, and ends by confirming that what is practised is conventional, not cooperative insurance.²⁷⁹³ This means the insurance cases are unsolved and parties lose their rights after years of legal battles.

IV Applying General Contract Law In Case Of Legal Vacuum In Insurance Contract Law:

This solution may be controversial, as some general contract law principles simply do not fit the nature of the insurance contract. Also, general contract law in Saudi Arabia is not

²⁷⁹¹ A. Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economies' ALQ 19(1) 91, 101 .

²⁷⁹² See Ch 3.

²⁷⁹³ Ibid.

codified, which makes it very hard to resort to. However, the resort to general contract would be only in case of a legal vacuum. Accordingly, careful drafting of the insurance contract law to include all the principal aspects surrounding the insurance operation, including waiver and burden of proof, will limit such resort to the minimum. Such approach, in the author's opinion, is more logical than the "*internationally accepted best practices*" provided by the IMCOCR2008, which was discussed in chapter 5 to be illogical.²⁷⁹⁴ Such an approach would correspond with former suggestions to amend the LSCIC2003 be a genuine cooperative insurance regulation.

In practice, it was observed that there are difficulties regarding viewing insurance cases which are specialised, e.g. construction and marine insurance cases, since they require more research by the IVDRC to comprehend and compare the solutions given in other jurisdictions. Hence, more integrated insurance law, which can cover different categories and types of insurance, is needed.²⁷⁹⁵

8.2.2 Promoting Knowledge In Insurance Technicalities And Principles, Including Good Faith

Even though good faith in Saudi laws is not a novel concept; ²⁷⁹⁶ it definitely needs more comprehension in the context of insurance. Insurance in general is relatively new to Saudis, with official laws being introduced in 2003, and compulsory insurance on vehicles introduced in 2002.²⁷⁹⁷ Hence, the technicalities of the insurance operation, and its principles and

²⁷⁹⁴ Art 11 IMCOCR2008.

²⁷⁹⁵ Interview with IVDRC members, IVDRC (Saudi Arabia, 9 January 2013).

²⁷⁹⁶ See Ch 4.

²⁷⁹⁷ See Ch 3.

concepts, are still not comprehended in full by judges, members of the IVDRC, legal practitioners, and of course the public. This issue stresses the importance of promoting knowledge and awareness amongst professionals and the public regarding these matters. It was obvious that the lack of knowledge and expertise in the insurance operation and its principles amongst professionals, e.g. judges, was a contributing factor to the inefficiency of the legal enforcement of insurance.²⁷⁹⁸ It has been already been mentioned that judges of the Board did not favour reviewing the subject of the cases appealed because of this lack in knowledge in addition to the doubts, regarding conformity with Islamic law.²⁷⁹⁹ This even applies to the IVDRC but to a lesser extent, as it was observed that some members apply non-suitable general contract principles on the insurance contract, which is not acceptable.²⁸⁰⁰ Therefore, legal professionals dealing with insurance must be trained extensively to have a thorough understanding of insurance technicalities, and not just its laws. This legal training in insurance is only the base for developing a fair and logical judgement in insurance cases, as it is hoped that it will lead to the critical analysis of each case and to the correct legal adaption of its incidents. As for the public, promoting awareness of insurance and its principles is crucial for those who are applying for insurance cover. The duty of good faith as a main principle affecting assureds should be noted and highlighted in insurance advertisements, in brochures, in the policy itself, and in the proposal form, in clear unambiguous language, and

²⁷⁹⁸ See Ch 3.

²⁷⁹⁹ Ibid.

²⁸⁰⁰ F. Alanzi, 'Altashkil Aljaded Lljnt Alfasal Fe Almnazat Altamineh' (2008) found in <<http://faculty.ksu.edu.sa/7107/DocLib/Forms/DispForm.aspx?ID=2>> accessed in 10 September 2012.

orally during the insurance sales process, with consideration to online and phone insurance.²⁸⁰¹

²⁸⁰¹ See also Art 32 & 42 of the IMCOCR2008 ; See Ch 5 under 5.3.

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UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS AND LAW

LAW

The Duty Of Good Faith In Insurance Law: A Study Of Saudi Law Compared To English Law

2 Volumes

Volume 2

By

Arwa Ibrahim A Aljallal

Thesis for the degree of Doctor of Philosophy

May 2014

Appendices

UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF BUSINESS AND LAW

Law

Doctor of Philosophy

THE DUTY OF GOOD FAITH IN INSURANCE LAW: A STUDY OF SAUDI
LAW COMPARED TO ENGLISH LAW

By: Arwa Ibrahim A Aljallal

The duty of good faith in insurance law is a significant legal principle in remedying the asymmetry in information between parties of an insurance contract. Such duty in Saudi insurance laws is not clear whether regarding its concept, limits, remedies or its application to intermediaries, with many legal gaps surrounding its application. Also, the number of cases containing a violation of the duty of good faith is considered 'high' and mostly done by the assureds. On the other hand, the consequences of breaching the duty of good faith may have serious effects on the insurance cover and liability of the parties. Hence, there is a need for clarifying the duty as a whole to make it more comprehensible, and to provide recommendations for developing the approach of Saudi insurance laws in general and regarding the duty of good faith in particular considering the various legal gaps in current laws and regulations. The Saudi enforcement and judicial systems lack experience in insurance cases due to the late official recognition of insurance as a transaction and the relatively recent promulgation of insurance laws and regulations. Considering Islamic law's doubts about insurance as a contract, insurance was practised in Saudi Arabia without official laws for a long period and the effects were disastrous on the assureds and on the industry. Commercial or conventional insurance is forbidden in Saudi Arabia, as the first comprehensive law regulating the insurance business which was not promulgated until 2003, indicates that only cooperative insurance is to be practised there. The English experience as an international hub for insurance and reinsurance provides valuable guidance to develop Saudi insurance laws and regulations, especially because English Insurance laws were used as a source of guidance when initially drafting Saudi insurance laws. In this thesis, the duty of good faith will be examined and compared in English and Saudi insurance laws and regulations. Suggestions for developing Saudi insurance laws will be given throughout, to improve the application of the duty and to balance the rights of the assureds and insurers. The suggestions aim to clarify the duty and to fill the legal gaps by developing a just approach regarding the concept of the duty of good faith, its limits, application to intermediaries, and remedies available in case of its breach, with a general consideration to protect policy holders, besides providing overall recommendations to improve the Saudi legal system regarding insurance. The thesis can clarify such duty of good faith and the remedies of breach and provide suggestions to fill the legal gaps in Saudi insurance laws benefiting assureds, legal practitioners, judges, insurance committees and insurers, on top of providing more understanding of Saudi insurance laws where information is scarce. It can also create a better understanding of the Islamic/cooperative insurance model adopted in Saudi Arabia and its differences from other countries adopting the same model.

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ENGLISH INSURANCE LAWS



Marine Insurance Act 1906

1906 CHAPTER 41 6 Edw 7

An Act to codify the Law relating to Marine Insurance.

[21st December 1906]

Disclosure and Representations

17 Insurance is uberrimæ fidei.

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

18 Disclosure by assured.

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:—

(a) Any circumstance which diminishes the risk;

(b)Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c)Any circumstance as to which information is waived by the insurer;

(d)Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4)Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5)The term “circumstance” includes any communication made to, or information received by, the assured.

19 Disclosure by agent effecting insurance.

Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a)Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b)Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

20 Representations pending negotiation of contract.

(1)Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2)A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3)A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4)A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5)A representation as to a matter of expectation or belief is true if it be made in good faith.

(6)A representation may be withdrawn or corrected before the contract is concluded.

(7)Whether a particular representation be material or not is, in each case, a question of fact.

Consumer Insurance (Disclosure and Representations) Act 2012

CHAPTER 6

Explanatory Notes have been produced to assist in the
understanding of this Act and are available separately

£5.75



Consumer Insurance (Disclosure and Representations) Act 2012

CHAPTER 6

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Consumer Insurance (Disclosure and Representations) Act 2012

2012 CHAPTER 6

An Act to make provision about disclosure and representations in connection with consumer insurance contracts. [8th March 2012]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Main definitions

1 Main definitions

In this Act—

“consumer insurance contract” means a contract of insurance between—

- (a) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and
- (b) a person who carries on the business of insurance and who becomes a party to the contract by way of that business (whether or not in accordance with permission for the purposes of the Financial Services and Markets Act 2000);

“consumer” means the individual who enters into a consumer insurance contract, or proposes to do so;

“insurer” means the person who is, or would become, the other party to a consumer insurance contract.

*Pre-contract and pre-variation information***2 Disclosure and representations before contract or variation**

- (1) This section makes provision about disclosure and representations by a consumer to an insurer before a consumer insurance contract is entered into or varied.
- (2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer.
- (3) A failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation for the purposes of this Act (whether or not it could be apart from this subsection).
- (4) The duty set out in subsection (2) replaces any duty relating to disclosure or representations by a consumer to an insurer which existed in the same circumstances before this Act applied.
- (5) Accordingly—
 - (a) any rule of law to the effect that a consumer insurance contract is one of the utmost good faith is modified to the extent required by the provisions of this Act, and
 - (b) the application of section 17 of the Marine Insurance Act 1906 (contracts of marine insurance are of utmost good faith), in relation to a contract of marine insurance which is a consumer insurance contract, is subject to the provisions of this Act.

3 Reasonable care

- (1) Whether or not a consumer has taken reasonable care not to make a misrepresentation is to be determined in the light of all the relevant circumstances.
- (2) The following are examples of things which may need to be taken into account in making a determination under subsection (1)—
 - (a) the type of consumer insurance contract in question, and its target market,
 - (b) any relevant explanatory material or publicity produced or authorised by the insurer,
 - (c) how clear, and how specific, the insurer's questions were,
 - (d) in the case of a failure to respond to the insurer's questions in connection with the renewal or variation of a consumer insurance contract, how clearly the insurer communicated the importance of answering those questions (or the possible consequences of failing to do so),
 - (e) whether or not an agent was acting for the consumer.
- (3) The standard of care required is that of a reasonable consumer: but this is subject to subsections (4) and (5).
- (4) If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account.
- (5) A misrepresentation made dishonestly is always to be taken as showing lack of reasonable care.

*Qualifying misrepresentations***4 Qualifying misrepresentations: definition and remedies**

- (1) An insurer has a remedy against a consumer for a misrepresentation made by the consumer before a consumer insurance contract was entered into or varied only if—
 - (a) the consumer made the misrepresentation in breach of the duty set out in section 2(2), and
 - (b) the insurer shows that without the misrepresentation, that insurer would not have entered into the contract (or agreed to the variation) at all, or would have done so only on different terms.
- (2) A misrepresentation for which the insurer has a remedy against the consumer is referred to in this Act as a “qualifying misrepresentation”.
- (3) The only such remedies available are set out in Schedule 1.

5 Qualifying misrepresentations: classification and presumptions

- (1) For the purposes of this Act, a qualifying misrepresentation (see section 4(2)) is either—
 - (a) deliberate or reckless, or
 - (b) careless.
- (2) A qualifying misrepresentation is deliberate or reckless if the consumer—
 - (a) knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and
 - (b) knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer.
- (3) A qualifying misrepresentation is careless if it is not deliberate or reckless.
- (4) It is for the insurer to show that a qualifying misrepresentation was deliberate or reckless.
- (5) But it is to be presumed, unless the contrary is shown—
 - (a) that the consumer had the knowledge of a reasonable consumer, and
 - (b) that the consumer knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer.

*Specific issues***6 Warranties and representations**

- (1) This section applies to representations made by a consumer—
 - (a) in connection with a proposed consumer insurance contract, or
 - (b) in connection with a proposed variation to a consumer insurance contract.
- (2) Such a representation is not capable of being converted into a warranty by means of any provision of the consumer insurance contract (or of the terms of the variation), or of any other contract (and whether by declaring the representation to form the basis of the contract or otherwise).

7 Group insurance

- (1) This section applies where—
 - (a) a contract of insurance is entered into by a person (“A”) in order to provide cover for another person (“C”), or is varied or extended so as to do so,
 - (b) C is not a party to the contract,
 - (c) so far as the cover for C is concerned, the contract would have been a consumer insurance contract if entered into by C rather than by A, and
 - (d) C provided information directly or indirectly to the insurer before the contract was entered into, or before it was varied or extended to provide cover for C.
- (2) So far as the cover for C is concerned—
 - (a) sections 2 and 3 apply in relation to disclosure and representations by C to the insurer as if C were proposing to enter into a consumer insurance contract for the relevant cover with the insurer, and
 - (b) subject to subsections (3) to (5) and the modifications in relation to the insurer’s remedies set out in Part 3 of Schedule 1, the remainder of this Act applies in relation to the cover for C as if C had entered into a consumer insurance contract for that cover with the insurer.
- (3) Section 4(1)(b) applies as if it read as follows—

“(b) the insurer shows that without the misrepresentation, that insurer would not have agreed to provide cover for C at all, or would have done so only on different terms.”
- (4) If there is more than one C, a breach on the part of one of them of the duty imposed (by virtue of subsection (2)(a)) by section 2(2) does not affect the contract so far as it relates to the others.
- (5) Nothing in this section affects any duty owed by A to the insurer, or any remedy which the insurer may have against A for breach of such a duty.

8 Insurance on life of another

- (1) This section applies in relation to a consumer insurance contract for life insurance on the life of an individual (“L”) who is not a party to the contract.
- (2) If this section applies—
 - (a) information provided to the insurer by L is to be treated for the purposes of this Act as if it were provided by the person who is the party to the contract, but
 - (b) in relation to such information, if anything turns on the state of mind, knowledge, circumstances or characteristics of the individual providing the information, it is to be determined by reference to L and not the party to the contract.

9 Agents

Schedule 2 applies for determining, for the purposes of this Act only, whether an agent through whom a consumer insurance contract is effected is the agent of the consumer or of the insurer.

10 Contracting out

- (1) A term of a consumer insurance contract, or of any other contract, which would put the consumer in a worse position as respects the matters mentioned in subsection (2) than the consumer would be in by virtue of the provisions of this Act is to that extent of no effect.
- (2) The matters are—
 - (a) disclosure and representations by the consumer to the insurer before the contract is entered into or varied, and
 - (b) any remedies for qualifying misrepresentations (see section 4(2)).
- (3) This section does not apply in relation to a contract for the settlement of a claim arising under a consumer insurance contract.

Final provision

11 Consequential provision

- (1) Any rule of law to the same effect as the following is abolished in relation to consumer insurance contracts—
 - (a) section 18 of the Marine Insurance Act 1906 (disclosure by assured),
 - (b) section 19 of that Act (disclosure by agent effecting insurance),
 - (c) section 20 of that Act (representations pending negotiation of contract).
- (2) The Marine Insurance Act 1906 is amended as follows—
 - (a) in section 18, at the end add—

“(6) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.”;
 - (b) in section 19, the existing text becomes subsection (1), and after that add—

“(2) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.”;
 - (c) in section 20, at the end add—

“(8) This section does not apply in relation to a contract of marine insurance if it is a consumer insurance contract within the meaning of the Consumer Insurance (Disclosure and Representations) Act 2012.”.
- (3) In section 152 of the Road Traffic Act 1988 (exceptions to duty of insurers to satisfy judgment against persons insured against third-party risks), in subsection (2)—
 - (a) in paragraph (a), after “avoid it” insert “either under the Consumer Insurance (Disclosure and Representations) Act 2012 or, if that Act does not apply,”;
 - (b) in paragraph (b), after “policy or security” insert “under that Act or”, and for “it” substitute “the policy or security”.

- (4) In Article 98A of the Road Traffic (Northern Ireland) Order 1981 (S.I. 1981/154 (N.I.)) (exceptions to duty of insurers to satisfy judgment against persons insured against third-party risks), in paragraph (2)—
 - (a) in sub-paragraph (a), after “avoid it” insert “either under the Consumer Insurance (Disclosure and Representations) Act 2012 or, if that Act does not apply,”;
 - (b) in sub-paragraph (b), after “policy or security” insert “under that Act or”, and for “it” substitute “the policy or security”.

12 Short title, commencement, application and extent

- (1) This Act may be cited as the Consumer Insurance (Disclosure and Representations) Act 2012.
- (2) Section 1 and this section come into force on the day on which this Act is passed, but otherwise this Act comes into force on such day as the Treasury may by order made by statutory instrument appoint.
- (3) An order under subsection (2) may not appoint a day sooner than the end of the period of 1 year beginning with the day on which this Act is passed.
- (4) This Act applies only in relation to consumer insurance contracts entered into, and variations to consumer insurance contracts agreed, after the Act comes into force.
 In the case of group insurance (see section 7), that includes the provision of cover for C by means of an insurance contract entered into by A after the Act comes into force, or varied or extended so as to do so after the Act comes into force.
- (5) Nothing in this Act affects the circumstances in which a person is bound by the acts or omissions of that person’s agent.
- (6) Apart from the provisions listed in subsection (7), this Act extends to England and Wales, Scotland and Northern Ireland.
- (7) In section 11—
 - (a) subsection (3) extends to England and Wales and Scotland only;
 - (b) subsection (4) extends to Northern Ireland only.

SCHEDULES

SCHEDULE 1

Section 4(3).

INSURERS' REMEDIES FOR QUALIFYING MISREPRESENTATIONS

PART 1

CONTRACTS

General

- 1 This Part of this Schedule applies in relation to qualifying misrepresentations made in connection with consumer insurance contracts (for variations to them, see Part 2).

Deliberate or reckless misrepresentations

- 2 If a qualifying misrepresentation was deliberate or reckless, the insurer—
 - (a) may avoid the contract and refuse all claims, and
 - (b) need not return any of the premiums paid, except to the extent (if any) that it would be unfair to the consumer to retain them.

Careless misrepresentations—claims

- 3 If the qualifying misrepresentation was careless, paragraphs 4 to 8 apply in relation to any claim.
- 4 The insurer's remedies are based on what it would have done if the consumer had complied with the duty set out in section 2(2), and paragraphs 5 to 8 are to be read accordingly.
- 5 If the insurer would not have entered into the consumer insurance contract on any terms, the insurer may avoid the contract and refuse all claims, but must return the premiums paid.
- 6 If the insurer would have entered into the consumer insurance contract, but on different terms (excluding terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms if the insurer so requires.
- 7 In addition, if the insurer would have entered into the consumer insurance contract (whether the terms relating to matters other than the premium would have been the same or different), but would have charged a higher premium, the insurer may reduce proportionately the amount to be paid on a claim.
- 8 "Reduce proportionately" means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under

the terms of the contract (or, if applicable, under the different terms provided for by virtue of paragraph 6), where—

$$X = \frac{\text{Premium actually charged}}{\text{Higher premium}} \times 100$$

Careless misrepresentations—treatment of contract for the future

- 9 (1) This paragraph—
- (a) applies if the qualifying misrepresentation was careless, but
 - (b) does not relate to any outstanding claim.
- (2) Paragraphs 5 and 6 (as read with paragraph 4) apply as they apply where a claim has been made.
- (3) Paragraph 7 (as read with paragraph 4) applies in relation to a claim yet to be made as it applies in relation to a claim which has been made.
- (4) If by virtue of sub-paragraph (2) or (3), the insurer would have either (or both) of the rights conferred by paragraph 6 or 7, the insurer may—
- (a) give notice to that effect to the consumer, or
 - (b) terminate the contract by giving reasonable notice to the consumer.
- (5) But the insurer may not terminate a contract under sub-paragraph (4)(b) if it is wholly or mainly one of life insurance.
- (6) If the insurer gives notice to the consumer under sub-paragraph (4)(a), the consumer may terminate the contract by giving reasonable notice to the insurer.
- (7) If either party terminates the contract under this paragraph, the insurer must refund any premiums paid for the terminated cover in respect of the balance of the contract term.
- (8) Termination of the contract under this paragraph does not affect the treatment of any claim arising under the contract in the period before termination.
- (9) Nothing in this paragraph affects any contractual right to terminate the contract.

PART 2

VARIATIONS

- 10 This Part of this Schedule applies in relation to qualifying misrepresentations made in connection with variations to consumer insurance contracts.
- 11 If the subject-matter of a variation can reasonably be treated separately from the subject-matter of the rest of the contract, Part 1 of this Schedule applies (with any necessary modifications) in relation to the variation as it applies in relation to a contract.
- 12 Otherwise, Part 1 applies (with any necessary modifications) as if the qualifying misrepresentation had been made in relation to the whole contract (for this purpose treated as including the variation) rather than

merely in relation to the variation.

PART 3

MODIFICATIONS FOR GROUP INSURANCE

- 13 Part 1 is to be read subject to the following modifications in relation to cover provided for C under a group insurance contract as mentioned in section 7 (and in this Part “A” and “C” mean the same as in that section).
- 14 References to the consumer insurance contract (however described) are to that part of the contract which provides for cover for C.
- 15 References to claims and premiums are to claims and premiums in relation to that cover.
- 16 The reference to the consumer is to be read—
- (a) in paragraph 2(b), as a reference to whoever paid the premiums, or the part of them that related to the cover for C,
 - (b) in paragraph 9(4) and (6), as a reference to A.

PART 4

SUPPLEMENTARY

- 17 Section 84 of the Marine Insurance Act 1906 (return of premium for failure of consideration) is to be read subject to the provisions of this Schedule in relation to contracts of marine insurance which are consumer insurance contracts.

SCHEDULE 2

Section 9.

RULES FOR DETERMINING STATUS OF AGENTS

- 1 This Schedule sets out rules for determining, for the purposes of this Act only, whether an agent through whom a consumer insurance contract is effected is acting as the agent of the consumer or of the insurer.
- 2 The agent is to be taken as the insurer's agent in each of the following cases—
- (a) when the agent does something in the agent's capacity as the appointed representative of the insurer for the purposes of the Financial Services and Markets Act 2000 (see section 39 of that Act),
 - (b) when the agent collects information from the consumer, if the insurer had given the agent express authority to do so as the insurer's agent,
 - (c) when the agent enters into the contract as the insurer's agent, if the insurer had given the agent express authority to do so.
- 3 (1) In any other case, it is to be presumed that the agent is acting as the consumer's agent unless, in the light of all the relevant circumstances, it appears that the agent is acting as the insurer's agent.
- (2) Some factors which may be relevant are set out below.
- (3) Examples of factors which may tend to confirm that the agent is acting for the consumer are—

-
- (a) the agent undertakes to give impartial advice to the consumer,
 - (b) the agent undertakes to conduct a fair analysis of the market,
 - (c) the consumer pays the agent a fee.
- (4) Examples of factors which may tend to show that the agent is acting for the insurer are—
- (a) the agent places insurance of the type in question with only one of the insurers who provide insurance of that type,
 - (b) the agent is under a contractual obligation which has the effect of restricting the number of insurers with whom the agent places insurance of the type in question,
 - (c) the insurer provides insurance of the type in question through only a small proportion of the agents who deal in that type of insurance,
 - (d) the insurer permits the agent to use the insurer's name in providing the agent's services,
 - (e) the insurance in question is marketed under the name of the agent,
 - (f) the insurer asks the agent to solicit the consumer's custom.
- 4 (1) If it appears to the Treasury that the list of factors in sub-paragraph (3) or (4) of paragraph 3 has become outdated, the Treasury may by order made by statutory instrument bring the list up to date by amending the sub-paragraph so as to add, omit or alter any factor.
- (2) A statutory instrument containing an order under sub-paragraph (1) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.
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Financial Services and Markets Act 2000

- 150.**—(1) A contravention by an authorised person of a rule is damages. actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.
- (2) If rules so provide, subsection (1) does not apply to contravention of a specified provision of those rules.
- (3) In prescribed cases, a contravention of a rule which would be actionable at the suit of a private person is actionable at the suit of a person who is not a private person, subject to the defences and other incidents applying to actions for breach of statutory duty.
- (4) In subsections (1) and (3) “rule” does not include—
- (a) listing rules; or
 - (b) a rule requiring an authorised person to have or maintain financial resources.
- (5) “Private person” has such meaning as may be prescribed.

ICOBS
Insurance: Conduct Of Business Source
Book

Chapter 8

Claims Handling

ICOBS 8.1 Insurers: general

ICOBS 8.1.1

06/01/2008

FCA

An insurer must:

- (1) handle claims promptly and fairly;
- (2) provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress;
- (3) not unreasonably reject a claim (including by terminating or avoiding a policy); and
- (4) settle claims promptly once settlement terms are agreed.

ICOBS 8.1.2

06/01/2008

FCA

A rejection of a consumer policyholder's claim is unreasonable, except where there is evidence of fraud, if it is for:

- (1) non-disclosure of a fact material to the risk which the policyholder could not reasonably be expected to have disclosed; or
- (2) non-negligent misrepresentation of a fact material to the risk; or
- (3) breach of warranty or condition unless the circumstances of the claim are connected to the breach and unless (for a pure protection contract):
 - (a) under a 'life of another' contract, the warranty relates to a statement of fact concerning the life to be assured and, if the statement had been made by the life to be assured under an 'own life' contract, the insurer could have rejected the claim under this rule; or
 - (b) the warranty is material to the risk and was drawn to the customer's attention before the conclusion of the contract.

ICOBS 8.2 Motor vehicle liability insurers

Application: who? what?

ICOBS 8.2.1

06/01/2008

FCA

(1) This section applies to a motor vehicle liability insurer.

(2) The rules in this section relating to the appointment of claims representatives apply in relation to claims by injured parties resulting from accidents occurring in an EEA State other than the injured party's EEA State of residence which are caused by the use of vehicles insured through an establishment in, and normally based in, an EEA State other than the injured party's EEA State of residence.

(3) The rules in this section relating to claims handling apply in respect of claims arising from any accident caused by a vehicle normally based in the United Kingdom.

[Note: article 20(1) of the Consolidated Motor Insurance Directive]

Requirement to appoint claims representatives

ICOBS 8.2.2

01/04/2013

[deleted]

ICOBS 8.2.2A

01/04/2013

FCA

A person carrying on, or seeking to carry on, motor vehicle liability insurance business must have a claims representative in each EEA state other than the United Kingdom.

Conditions for appointing claims representatives

ICOBS 8.2.3

06/01/2008

FCA

A firm must ensure that each claims representative:

- (1) is responsible for handling and settling a claim by an injured party;
- (2) is resident or established in the EEA State where it is appointed;
- (3) collects all information necessary in connection with the settlement of a claim and takes the measures necessary to negotiate its settlement;
- (4) possesses sufficient powers to represent the firm in relation to an injured party and to meet an injured party's claim in full; and
- (5) is capable of examining cases in the official language(s) of the EEA State of residence of the injured party.

[Note: article 21(1), (4) and (5) of the Consolidated Motor Insurance Directive]

ICOBS 8.2.4

06/01/2008

FCA

The requirement to possess sufficient powers does not prevent a claims representative from seeking additional authority or instructions if needed. It does prevent it from declining to deal with, or transferring responsibility for, claims properly referred to it by an injured party, or their representative.

Notifying the appointment of claims representatives

ICOBS 8.2.5

01/01/2011

FCA

- (1) A firm must notify to the information centres of all EEA States:
 - (a) the name and address of the claims representative which they have appointed in each of the EEA States;

[Note: article 23(2) of the Consolidated Motor Insurance Directive]

- (b) the telephone number and effective date of appointment; and
 - (c) any material change to information previously notified.
- (2) Notification must be made within ten business days of an appointment or of a material change.

Motor vehicle liability claims handling rules

ICOBs 8.2.6

06/01/2008

FCA

Within three months of the injured party presenting his claim for compensation:

(1) the firm of the person who caused the accident or its claims representative must make a reasoned offer of compensation in cases where liability is not contested and the damages have been quantified; or

(2) the firm to whom the claim for compensation has been addressed or its claims representative must provide a reasoned reply to the points made in the claim in cases where liability is denied or has not been clearly determined or the damages have not been fully quantified.

[Note: article 22 of the Consolidated Motor Insurance Directive and article 3 of the Consolidated Motor Insurance Directive]

ICOBs 8.2.7

06/01/2008

FCA

(1) If liability is initially denied, or not admitted, within three months of any subsequent admission of liability, the firm must (directly, or through a claims representative) make a reasoned offer of settlement, if, by that time, the relevant claim for damages has been fully quantified.

(2) If an injured party's claim for damages is not fully quantified when it is first made, within three months of the subsequent receipt of a fully quantified claim for damages, the firm must (directly, or through a claims representative) make a reasoned offer of damages, if liability is admitted at that time.

ICOBs 8.2.8

06/01/2008

FCA

A claim for damages will be fully quantified for the purpose of this section when the injured party provides written evidence which substantiates or supports the amounts claimed.

Interest on compensation

ICOBs 8.2.9

06/01/2008

FCA

(1) If the firm, or its claims representative, does not make an offer as required by this section, the firm must pay simple interest on the amount of compensation offered by it or awarded by the court to the injured party, unless interest is awarded by any tribunal.

(2) The interest calculation period begins when the offer should have been made and ends when the compensation is paid to the injured party, or his authorised representative.

(3) The interest rate is the Bank of England's base rate (from time to time), plus 4%.

[Note: article 22 of the Consolidated Motor Insurance Directive. Regulation 6 of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001 makes this rule actionable under section 138D of the Act (Actions for damages) by any person who suffers loss as a result of its contravention]

ICOBS 8.2.10

06/01/2008

FCA

A firm will be taken to have received a claim, or a fully quantified claim, for damages when the claim is delivered to it, or a claims representative, by any person by any method of delivery which is lawful in the firm's, or its claims representative's, respective State of residence or establishment.

ICOBS 8.2.11

06/01/2008

FCA

The provisions in this section are not intended to, and do not, restrict any rights which the injured party, or its motor vehicle liability insurer, or any other insurer acting on its behalf, may have and which would enable any of them to begin legal proceedings against the person causing the accident or that person's, or the vehicle's, insurers.

ICOBS 8.3 Insurance intermediaries (and insurers handling claims on another insurer's policy)**Application: who?**

ICOBS 8.3.1

06/01/2008

FCA

This section applies to an insurance intermediary, and to an insurer handling a claim on another insurance undertaking's policy.

Interaction with the general law

ICOBS 8.3.2

06/01/2008

FCA

A firm is expected to comply with the general law on the duties of an insurance intermediary. This section does not seek to set out the full extent of those duties.

Conflicts of interest

ICOBS 8.3.3

01/04/2009

FCA

(1) Principle 8 requires a firm to manage conflicts of interest fairly. SYSC 10 also requires an insurance intermediary to take all reasonable steps to identify conflicts of interest, and maintain and operate effective organisational and administrative arrangements to prevent conflicts of interest from constituting or giving rise to a material risk of damage to its clients.

(2) [deleted]

(3) If a firm acts for a customer in arranging a policy, it is likely to be the customer's agent (and that of any other policyholders). If the firm intends to be the insurance undertaking's agent in relation to claims, it needs to consider the risk of becoming unable to act without breaching its duty to either the insurance undertaking or the customer making the claim. It should also inform the customer of its intention.

(4) A firm should in particular consider whether declining to act would be the most reasonable step where it is not possible to manage a conflict, for example where the firm knows both that its customer will accept a low settlement to obtain

a quick payment, and that the insurance undertaking is willing to settle for a higher amount.

Dealing with claims notifications without claims handling authority

ICOBS 8.3.4

06/01/2008

FCA

A firm that does not have authority to deal with a claim should forward any claim notification to the insurance undertaking promptly, or inform the policyholder immediately that it cannot deal with the notification.

ICOBS 8.4 Employers' Liability Insurance

Application

ICOBS 8.4.1

01/04/2012

FCA

(1) The general application rule in ICOBS 1.1.1 R applies to this section subject to the modifications in (2).

(2) This section applies to:

(a) any firm solely with respect to the activities of:

(i) carrying out contracts of insurance; or

(ii) managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's;

in relation to general insurance contracts and, in either case, including business accepted under reinsurance to close;

(b) all incoming EEA firms or incoming Treaty firms falling within (a) including those providing cross border services.

(3) In this section references to:

(a) an 'employers' liability register' are to the employers' liability register referred to in ICOBS 8.4.4R (1)(a);

(b) a 'director's certificate' are to a statement complying with the requirements in ICOBS 8.4.4R (1)(b);

(c) employers' liability insurance include business accepted under reinsurance to close covering employers' liability insurance (including business that is only included as employers' liability insurance for the purposes of this section) ; and

(d) a 'qualified director's certificate' are to the statement complying with the requirements in ICOBS 8.4.4R (1)(b)(ii).

ICOBS 8.4.2

06/03/2011

FCA

ICOBS 8.4 does not generally apply to activities carried out in relation to a reinsurance contract (see ICOBS 1.1.2 R and ICOBS 1 Annex 1 Part 2 1.1 R) but it does apply to business accepted under reinsurance to close.

Purpose

ICOBS 8.4.3

01/04/2012

FCA

The purpose of ICOBS 8.4 is to assist individuals with claims arising out of their course of employment in the United Kingdom for employers carrying on, or who carried on, business in the United Kingdom, to identify an insurer or insurers that provided employers' liability insurance (other than certain co-insurance and excess cover arrangements) by requiring insurers to produce an employers' liability register. In particular it aims to assist ex-employees whose employers no longer exist or who cannot be located.

Principal obligation to produce an employers' liability register and supporting documents

ICOBS 8.4.4

01/04/2013

FCA

(1) A firm carrying out contracts of insurance, or a managing agent managing insurance business, including in either case business accepted under reinsurance to close, which includes United Kingdom commercial lines employers' liability insurance, must:

(a) produce an employers' liability register complying with the requirements in (2) and ICOBS 8 Annex 1;

(b) obtain and submit to the FCA a written statement, by a director of the firm responsible for the production of the employers' liability register, that to the best of the director's knowledge the firm in its production of the register is either:

(i) materially compliant with the requirements of ICOBS 8.4.4R (2) and ICOBS 8 Annex 1; or

(ii) not materially compliant with the provisions referred to in (i), in which case the statement must also set out, to the best of the director's knowledge, the information required by ICOBS 8.4.4A R; and

(c) obtain and submit to the FCA a report satisfying the requirements of ICOBS 8.4.4C R, prepared by an auditor satisfying the requirements of SUP 3.4 and SUP 3.8.5 R to 3.8.6 R, and addressed to the directors of the firm.

(1A) For the purposes of ICOBS 8.4.4R (1)(b):

(a) 'materially compliant' means that in relation to at least ninety-nine percent of policies for which information is required to be included, the information in the register does not contain any inaccuracy or lack faithful reproduction (as relevant) that would affect the outcome of a search when compared to a search carried out with fully accurate and/or faithfully reproduced information; and

(b) the firm must ensure that the director's certificate includes the description of 'materially compliant' referred to in (a).

(2) For the purposes of (1)(a) the employers' liability register is required to:

(a) include the date upon which the register was produced;

(b) include a database which:

(i) reliably stores information required by ICOBS 8 Annex 1;

(ii) in relation to information required by ICOBS 8 Annex 1 1.1R(1), contains accurate information and, in relation to information required by ICOBS 8 Annex 1 1.1R(2), contains information which faithfully reproduces the information that the firm has; and

(iii) has an effective search function which allows a person inputting data included on the register relating to a particular employer over a particular period to retrieve information on the register relating to a potential employers' liability claim corresponding to that employer and period;

(c) allow for requests for information or searches relating to a potential claim to be made by:

(i) individuals with the potential claim, or their authorised representative, or

- (ii) any employer to whom the potential claim relates; or
- (iii) an insurer which is potentially jointly and severally liable with another firm in relation to the potential claim; or
- (iv) a relevant insurance intermediary acting for an insurer in (iii);
- (d) allow for requests by a tracing office which meets the conditions in ICOBS 8.4.9R relating to the use of information on the firm's register to the extent that the information is necessary, and used solely, to enable the tracing office to provide comprehensive searching facilities to its users; and
- (e) allow for responses to requests or searches in (c) to be provided without delay.
- (3) For the purposes of (1)(b) and (c) the director's certificate and report prepared by an auditor must:
 - (a) relate to a version of the register as at a date no later than 12 months after it is first produced in accordance with (1)(a); and:
 - (b) be obtained and submitted to the FCA within four months of the date in (a).
- (4) For the purposes of (1):
 - (a) United Kingdom commercial lines employers' liability insurance means commercial lines employers' liability insurance where both the employer's business was or is carried on, and the employees' course of employment was or is, in the United Kingdom; and
 - (b) commercial lines business comprises contracts of insurance carried out in relation to persons whose employers' liability insurance relates to a business or profession they carry on.

ICOBS 8.4.4A

01/04/2012

FCA

The information referred to in ICOBS 8.4.4R (1)(b)(ii) is:

- (1) a description of the ways in which the firm, in its production of the register, is not materially compliant;
- (2) the number of policies, in relation to which, either:
 - (a) the firm is not able to include any information in the register; and/or
 - (b) information is included in the register but information may be incorrect or incomplete;
 in each case as a proportion of the total number of policies required to be included in the register;
- (3) where the firm is only practicably able to provide an estimate of the numbers in (2), the basis of each estimate; and
- (4) a description of the systems and controls used in the production of the register and of the steps, together with relevant timescales, that the firm is taking to ensure that the firm will be materially compliant as soon as practicable.

ICOBS 8.4.4B

01/04/2012

FCA

In relation to the written statement referred to in ICOBS 8.4.4R (1)(b):

- (1) ICOBS 8.4.4R (1)(b) does not preclude the relevant director from, in addition, including in the director's statement any of the following as relevant:
 - (a) if a firm's employers' liability register is more than materially compliant, a statement to this effect, and/or a statement of the extent to which the director considers, to the best of his knowledge, the firm to be compliant in its production of the register;
 - (b) reasons for the level of any non-compliance; and/or

(c) information relating to policies which are not required to be included in the register;

(2) the statement regarding the firm's level of compliance with requirements in ICOBS 8.4.4R (2) and ICOBS 8 Annex 1, and, in relevant cases, the steps the firm is undertaking to ensure material compliance as soon as practicable, does not alter the underlying requirement that the firm has to comply fully with the relevant requirements in ICOBS 8.4.4R (2) and ICOBS 8 Annex 1 (that is, not just to a material extent). So, it is possible that a firm will be able to comply with ICOBS 8.4.4R (1)(b) but continue to not fully comply with the underlying requirements, for example, in respect of the policies falling outside the ninety-nine percent threshold. In relation to these policies, as well as those identified in any qualified director's certificate, the firm will need to remedy errors or omissions as soon as practicable, and have systems and controls in place to give effect to this on an ongoing basis.

ICOBS 8.4.4C

01/04/2012

FCA

The report referred to in ICOBS 8.4.4R (1)(c) must:

(1) be prepared on the basis of providing an opinion under a limited assurance engagement confirming whether the auditor has found no reason to believe that the firm, solely in relation to the firm's extraction of information from its underlying records, has not materially complied with the requirements in ICOBS 8.4.4R (2) and ICOBS 8 Annex 1 in the production of its employer's liability register, having regard in particular to the possible errors and omissions referred to in (3) below;

(2) use the description of material compliance as referred to in ICOBS 8.4.4R (1A)(a) adapted as necessary to apply solely to the firm's extraction of information from its underlying records;

(3) address, in particular, the following risks:

(a) information relating to certain policies issued or renewed on or after 1 April 2011 is entirely omitted from the register even though some relevant policy details are included in the firm's underlying records;

(b) information relating to certain policies in respect of which claims were made on or after 1 April 2011 is entirely omitted from the register even though some relevant policy details are included in the firm's underlying records;

(c) relevant information required to be included in the register, and which is included in the firm's underlying records, is omitted from, or is inaccurately entered on to, the register; and

(d) information relating to policies which do not provide employers' liability insurance are included in the register.

ICOBS 8.4.5

01/04/2013

FCA

(1) For the purposes of ICOBS 8.4.4R (2)(c) and ICOBS 8.4.4 R (2)(d), a firm may put in place appropriate screening on its employers' liability register to monitor:

(a) requests for information and searches to ensure that they are being made for a legitimate purpose by persons falling into one of the categories in ICOBS 8.4.4R (2)(c); and

(b) requests from tracing offices to ensure that the information is necessary, and will only be used by the tracing office, for the purposes of providing users of the tracing service with the same information as the firm itself would have provided had the inquirer approached the firm directly.

If a firm has any reason to suspect that the information is, or may be, being misused then it may restrict the use of the information provided or request its return.

(2) For the purposes of ICOBS 8.4.4R (2)(e) the FCA expects that, in the ordinary course, a person searching or making an information request will be provided with a response within one business day of the initial request.

(3) In the FCA's view, commercial lines business does not include employers' liability insurance provided for retail consumers, for example, in relation to insurance taken out to cover liability in relation to domestic arrangements such as home help.

FCA notification requirements

ICOBS 8.4.6

01/04/2013

FCA

A firm must:

(1) notify the FCA, within one month of falling within ICOBS 8.4.1R (2), as to whether or not it, or, if relevant, a member of the syndicates it manages, carries on business falling within ICOBS 8.4.4R (1) and, if it does, include in that notification:

(a) details of the internet address of the firm or tracing office at which the employers' liability register is made available;

(b) the name of a contact person at the firm and their telephone number or postal address, or both; and

(c) the period over which the firm or syndicate member provided cover under relevant policies or, if still continuing, the date that cover commenced; and

(d) the firm's Firm Reference Number; and

(2) ensure that the notification in (1):

(a) is approved and signed by a director of the firm; and

(b) contains a statement that to the best of the director's knowledge the content of the notification is true and accurate.

ICOBS 8.4.6A

01/04/2013

FCA

A firm with potential liability under an excess policy and which satisfies the requirements in ICOBS 8 Annex 1 1.1B R must notify the FCA before the date upon which it first seeks to rely upon that rule and ensure that the requirements of ICOBS 8.4.6R (2) are satisfied in respect of this notification.

Requirement to make employers' liability register and supporting documents available

ICOBS 8.4.7

01/04/2013

FCA

(1) A firm must make available:

(a) the information on the employers' liability register either:

(i) on the firm's website at the address notified to the FCA in ICOBS 8.4.6R (1); or

(ii) by arranging for a tracing office which meets the conditions in ICOBS 8.4.9 R to make the information available on the tracing office's website; and

(b) the latest director's certificate and the latest report prepared by an auditor for the purposes of ICOBS 8.4.4R (1)(c), to a tracing office which has obtained information from the firm for the purposes of providing comprehensive tracing information, in accordance with ICOBS 8.4.4R (2)(d), provided that the tracing

office has agreed with the firm not to disclosure confidential information in the certificate and the report to third parties, save as required by law.

(2) If a firm arranges for a tracing office to make information available for the purposes of (1)(a)(ii) the firm must:

(a) send to the tracing office copies of its latest director's certificate and report prepared by the firm's auditor provided that the tracing office has agreed with the firm not to disclosure confidential information in the certificate and the report to third parties, save as required by law;

(b) maintain records of all the tracing information and copies of all documents it has provided to the tracing office;

(c) retain all legal rights in relation to the ownership and use of the information and documents provided to the tracing office to enable the firm to provide that information or documentation to another tracing office or to make it available itself; and

(d) send to the tracing office its Firm Reference Number.

ICOB 8.4.8

01/04/2012

FCA

For the purposes of ICOB 8.4.4R (2)(d) and ICOB 8.4.7R (1)(a)(ii) the existence of published and up-to-date versions of both a certificate from the directors of the tracing office, stating that the tracing office has complied in all material respects with the requirements in ICOB 8.4.9R (1) to (6), and a report under a reasonable assurance engagement, addressing the accuracy and completeness of the tracing office's database, may be relied upon as tending to establish that a firm has satisfied the requirement to use a tracing office which meets the conditions in ICOB 8.4.9R (1) to (6).

Qualifying tracing offices

ICOB 8.4.9

01/04/2012

FCA

The conditions referred to in ICOB 8.4.4R (2)(d) and ICOB 8.4.7R (1)(a)(ii) are that the tracing office is one which:

(1) maintains a database which:

(a) accurately and reliably stores information submitted to it by firms for the purposes of complying with these rules;

(b) has systems which can adequately keep it up to date in the light of new information provided by firms;

(c) has an effective search function which allows a person inputting data included on the database relating to a particular employer over a particular period to retrieve information on the database relating to a potential employers' liability claim corresponding to that employer and period;

(2) maintains adequate records of the director's certificates and reports prepared by an auditor sent to it by firms for the purposes of complying with these rules;

(3) has effective arrangements for information security, information back up and business continuity and to prevent the misuse of data;

(4) accepts search requests in relation to information in (1) relating to a potential claim from:

(a) individuals with the potential claim, or their authorised representative; or

(b) the employer to whom the potential claim relates; or

(c) an insurer which is potentially jointly and severally liable with another firm in relation to the potential claim; or

(d) a relevant insurance intermediary acting for an insurer in (c);

- (5) provides responses to requests in (4) without delay;
- (6) has adequate arrangements for providing to a firm, upon request and without delay, a full copy of the information on the database that the firm has provided to it;
- (7) includes in its published annual report:
 - (a) a certificate from the directors of the tracing office stating whether the tracing office has complied with the requirements in (1) to (6) in relation to the period covered by the annual report; and
 - (b) an independent report commissioned under a reasonable assurance engagement satisfying the requirement in ICOBS 8.4.9A R, addressing the accuracy and completeness of the database, prepared by an auditor satisfying the requirements of SUP 3.4 and SUP 3.8.5 R to SUP 3.8.6 R, and addressed to the directors of the tracing office; and
- (8) provides to a firm making use of the tracing office for the purposes of ICOBS 8.4.7R (1)(a)(ii):
 - (a) a copy of its annual report promptly after publication; and
 - (b) upon request and without delay a full copy of the information on the database that the firm has provided to it.

ICOBS 8.4.9A

01/04/2012

FCA

The requirement referred to in ICOBS 8.4.9R (7)(b) is that the report must include an opinion from the auditor confirming whether, in all material respects, the tracing office maintains a database which accurately and reliably stores information submitted to it by firms for the purpose of complying with relevant requirements in ICOBS 8.4 and that it has systems which can adequately keep it up to date in the light of new information provided by firms.

ICOBS 8.4.10

01/04/2013

FCA

- (1) ICOBS 8.4.4R (2)(b) and ICOBS 8.4.9R (1) require a firm, or a tracing office used by a firm, to have an effective search function in relation to the employers' liability register database. In the FCA's view an effective search function is one which finds all matches in the register to any specified whole word.
- (2) For the purposes of ICOBS 8.4.9R (5) the term 'without delay' should have the same meaning as in ICOBS 8.4.5G (2).
- (3) In order to assist firms with their obligations under these rules the FCA has agreed to publish on its website at <http://www.fca.org.uk/consumers/financial-services-products/insurance/employers-liability> a list of persons providing tracing office facilities which have published the directors' certificate and independent assurance report referred to in ICOBS 8.4.9R (7).

Updating and verification requirements

ICOBS 8.4.11

01/04/2013

FCA

- (1) A firm must notify the FCA:
 - (a) of any information provided to the FCA under ICOBS 8.4.6 R or ICOBS 8.4.6A R which ceases to be true or accurate; and
 - (b) of the new position, in accordance with the notification requirements in ICOBS 8.4.6 R;
 within one month of the change.
- (2) A firm producing an employers' liability register must:

- (a) update the register with any new or more accurate information falling within ICOBS 8 Annex 1:
 - (i) by virtue of the entry into or renewal of, or of a claim made in relation to, a policy, as required by ICOBS 8 Annex 1 Part 1; and
 - (ii) in all other cases, by virtue of the firm having received that new or more accurate information;
- (b) make the updated information in (a) available, in accordance with ICOBS 8.4.7 R, no later than:
 - (i) in relation to new or more accurate information arising out of the entry into or renewal of, or a claim made in relation to, a policy, three months from the date of entry, renewal or the date upon which the claim was made; and
 - (ii) in all other cases, three months from the date upon which the firm received the new or more accurate information;
- (c) update the register, no less frequently than once every three months, and include the date that the register was updated and a statement that the register may be relied on as up-to-date as at a date three months prior to the date upon which the register was updated, or such later date as applicable to the firm;
- (d) obtain and submit to the FCA a director's certificate:
 - (i) no later than twelve months after the date of the most recent director's certificate, obtained and submitted to the FCA in accordance with ICOBS 8.4.4R (1)(b) or this rule;
 - (ii) complying with the requirements, and containing one of the statements, set out in ICOBS 8.4.4R (1)(b); and
 - (iii) in relation to a version of the employers' liability register dated no more than four months prior to the date of the director's certificate;
- (e) obtain and submit to the FCA a report prepared by an auditor:
 - (i) no later than twelve months after the date of the most recent report, obtained and submitted to the FCA in accordance with ICOBS 8.4.4R (1)(c) or this rule;
 - (ii) complying with the requirements set out in ICOBS 8.4.4R (1)(c); and
 - (iii) in relation to a version of the employers' liability register dated no more than four months prior to the date of the report; and
- (f) make available, in accordance with ICOBS 8.4.7 R, the director's statement in (d) and the report in (e) no later than four months after the effective date of the version of the register to which they relate, in place of the previous certificate and report.

ICOBS 8.4.12

06/03/2011

FCA

For the purposes of ICOBS 8.4.11R (2)(c) a firm is required to include the date at which it updates the register. However, depending on the firm's processes for making information available for the purposes of ICOBS 8.4.11R (2)(b), the register may only be relied upon as being up-to-date as at a date three months prior to the date on which the firm has updated the register, or such lesser period as applicable to the firm as is consistent with the firm's processes. ICOBS 8.4.11R (2)(c) requires the firm to include a statement as to the date at which the register may be relied upon as containing up-to-date information which can be no earlier than three months prior to the new date on the register, but may be later depending on the firm's circumstances.

ICOBS 8.4.12A

01/04/2012

FCA

(1) For the purposes of ICOBS 8.4.11R (2)(a), 8.4.11R (2)(b) and ICOBS 8 Annex 1 a claim is deemed to be made in relation to a policy at the date on which the firm establishes, or otherwise accepts, that it has provided relevant cover

under the policy, and is therefore potentially liable subject to the terms of the policy.

(2) A firm must use reasonable endeavours to establish whether it has provided relevant cover:

(a) within three months of being notified of a potential claim; or

(b) if that is not possible, as soon as is reasonably practicable thereafter.

Transfers of insurance business

ICOBS 8.4.13

06/03/2011

FCA

The transferor in an insurance business transfer scheme must provide the transferee with the information and documents the transferor holds in compliance with ICOBS 8.4 in respect of the insurance business transferred.

SAUDI INSURANCE LAWS

Law

On Supervision of Cooperative Insurance Companies 2003

Article 1

Insurance in the Kingdom shall be undertaken through registered insurance companies operating in a cooperative manner as it is provided within the article establishment of the National Company for Cooperative Insurance promulgated by Royal Decree M/5 dated 17/5/1405 H, and in accordance with the principles of Islamic Shari'a.

Article 2

Subject to the provisions of the Cooperative Health Insurance Law, promulgated by Royal Decree M/10 dated 1/5/1420 H, The Saudi Arabian Monetary Agency (the "Agency") shall, in the course of implementing the Regulations, have the following powers:

- 1- To receive applications for establishing cooperative insurance and re-insurance companies, study the applications to ensure compliance with applicable rules and conditions and, if approved, refer the applications to the Ministry of Commerce and Industry to take the necessary legal requirements.
- 2- To supervise technically the operations of insurance and re-insurance in accordance with the principles specified by the Implementing Regulations of the Law and with the methods of supervision used by the Agency, and in particular:
 - a) regulating and approving the rules of investment in insurance and re-insurance operations and establishing a formula for the distribution of the surplus of insurance and re-insurance operations between the shareholders and the insured persons after giving regard that there are accounts for shareholders and other separate accounts for the insured persons and insurance operations.
 - b) determining the funds that need to be deposited in one of the local banks to undertake each class of insurance activity.
 - c) approving insurance and re-insurance standard policy forms and fixing the minimum amounts for covering third party liability, subject to other applicable laws.
 - d) establishing rules and controls to determine the means of investing in the assets of insurance and re-insurance companies.

e) establishing general rules to determine the assets that each company should maintain inside and outside the Kingdom, with a minimum and maximum amount for each class of insurance and the conditions to be observed for each class, along with specifying the minimum and maximum amount of contributions and insurance premiums against the capital and reserves of the company.

Article 3

No insurance or re-insurance Company may be incorporated in the Kingdom without a license issued by Royal Decree after a virtue of an Edict issued by the Council of Ministers upon a recommendation from the Minister of Commerce and Industry in accordance with article 2 above, provided that:

- 1- The applicant must be a joint stock company.
- 2- The main object of the company shall be to engage in any of the insurance and re-insurance activities, and not to undertake any other activities unless they are complementary or necessary. Insurance companies may not directly own brokerage companies or establishments. Re-insurance companies may not also own re-insurance brokerage companies or establishments. However, insurance companies may, subject to obtaining the Agency's approval, own companies or establishments engaged in re-insurance brokerage activities.
- 3- The capital of the insurance company shall not be less than SR 100,000,000 and the paid-up capital of a re-insurance company or an insurance company engaged at the same time in re-insurance activities shall not be less than SR 200,000,000. The capital may not be altered without the Agency's approval in accordance with the Companies Law.

Article 4

The Implementing Regulations shall specify the insurance activities covered in this Law and each insurance company shall determine the type of activities it will undertake.

Article 5

Insurance and re-insurance companies may not, after commencing to engage in operations, suspend their insurance activities without the approval of the Agency to ensure that the insurance companies have made the necessary arrangements to protect the rights of the insured persons and the investors.

Article 6

The Agency's approval of the selection of the members of the boards of directors of insurance and re-insurance companies shall be obtained, in accordance with the criteria specified in the Implementing Regulations.

Article 7

The chairman, managing director, board member and the general manager of insurance and re-insurance companies shall be, each in his respective capacity, responsible for any violation of the provisions of this Law or its Implementing Regulations.

Article 8

The Agency shall have the right to inspect the records and accounts of any insurance or re-insurance company through its personnel or the auditors appointed by the Agency. Such inspection shall take place at the premises of the insurance or re-insurance company and the employees of the company must provide the inspectors or auditors appointed by the Agency with all the records, accounts, documents and information requested by them.

Article 9

Insurance or re-insurance companies may not open branches or offices inside or outside the Kingdom or agree to a merger with, own, control or purchase shares in other insurance or re-insurance companies without the Agency's written approval.

Article 10

1. The general assembly of the insurance or re-insurance company shall, each year, appoint two auditing firms licensed to operate in the Kingdom and fix their remuneration.
2. The annual report submitted by the auditors to the general assembly must include, in addition to the particulars provided for in the Companies Law, the auditors' opinion as to whether company's financial statements fairly reflect its financial position as of the date of the balance sheet and the result of its operations in the financial year then ending, as well as whether the preparation, presentation and auditing of these statements have been done in accordance with the accounting principles applicable in the Kingdom.
3. The financial statements and the auditors' report must be published within three months from the expiry of the company's financial year.

Article 11

The Agency shall have the right to require the insurance and re-insurance companies to provide it, in the form and at the dates it deems appropriate, with any information it sees necessary to realize the objectives of this Law. Such companies must forward to the Agency, upon its request, the following documents:

1. A statement of the revenues and expenses for each insurance class.
2. A detailed statement on its insurance operations during the period.
3. Statistics and general information on their activities.
4. A statement of their investments.
5. Any other statements required by the Agency.

Article 12

Any person who obtains any information in the course of carrying out any act related to the implementation of the provisions of this Law may not disclose such information or use it for the benefit of others in any way whatsoever.

Article 13

All insurance and re-insurance companies must submit to DZIT a tax and Zakat declaration, audited financial statements and other statements or documents requested by DZIT for assessing income tax and Zakat in accordance with the Tax Law and its Implementing Regulations. Such companies shall pay their dues at the times appointed in the Law.

Article 14

Insurance and re-insurance companies subject to this Law must deposit with one of the local banks a statutory deposit for the order of the Agency, and the Implementing Regulations shall determine the requirements regulating such deposit.

Article 15

Insurance and re-insurance companies shall set aside no less than 20% of their profits as a statutory reserve until this reserve amounts to 100% of paid capital.

Article 16

Each insurance and re-insurance company must set aside the necessary reserves for each insurance class they undertake, along with other reserves provided for in the Implementing Regulations.

Article 17

All insurance and re-insurance companies subject to the provisions hereof must maintain a separate account for each insurance class in accordance with the requirements of the Implementing Regulations of this Law. They must also maintain records and books in which shall be entered the insurance policies issued by the company, the names and addresses of the policy holders, the date of executing each policy, its validity, the rates and conditions stated therein and any amendment or alterations effected thereon. The Agency may, at its own direction, issue resolutions requiring insurance companies to enter in such records and books any information needed for exercising the Agency's supervisory powers. Such recorded data and information may be stored on the computer under the rules and procedures set forth in the Implementing Regulations of the Commercial Books Law.

Article 18

The Agency shall lay down the required conditions for granting licenses to self-employment occupations related to insurance, particularly the following:

1. Insurance brokers
2. Insurance consultants
3. Inspectors and loss adjusters.
4. Experts in settling insurance claims
5. Actuaries

Provided that the license shall be issued by the Ministry of Commerce and Industry to those wishing to engage in these self-employment occupations. The Agency shall undertake supervision and control over the activities of the occupations referred to above.

Article 19

The Agency may, if it establishes that an insurance or re-insurance company has violated the provisions of this Law or its Implementing Regulations, or has followed a policy that

would seriously effect its ability to meet its obligations, adopt one or more of the following measures:

1. appoint one or more consultant to provide the company in managing its business activities;
2. suspend or dismiss any board member or employee held responsible for such violation;
3. prevent the company from admitting new subscribers, investors or participants in any of its insurance activities or put a limitation on these acts; or
4. oblige the company to take any action the Agency deems necessary.

If the Agency finds that the company has continued to violate the provisions of this Law or its Implementing Regulations and failed to take any of the measures taken by the Agency, despite the penalties imposed on it under this Law, the Agency may demand that the company be wound up.

Article 20

One committee or more shall be formed by an Edict of the Council of Ministers on a recommendation of the Minister of Finance. Such committee or committees shall consist of three specialized members, one of whom, at least, must be a legal consultant. The committee shall undertake to resolve the disputes arising between insurance companies and their customers or between the companies and other companies when they subrogate the insured persons, and settle violations of regulatory and supervisory instructions issued to insurance and re-insurance companies and the violations of those engaged in self-employment occupations referred to under Article (18) above. Representing the Public Prosecution before this committee, in respect of such violations, shall be the employees appointed by virtue of an order issued by the Minister of Finance. Resolutions adopted by such committees may be appealed before the Grievances Department.

Article 21

Without prejudice to any sterner penalty provided for in any other Law, a penalty of no more than Saudi Riyals one million (SR 1,000,000) or a prison term of no more than four years, or both, shall be imposed on anyone violating any of the provisions of this Law or its Implementing Regulations.

Article 22

Without prejudice the powers of the committee referred to under Article (20) above, the Grievances Department shall have the following powers:

1. Settlement of all disputes between insurance and re-insurance companies or between both.
2. Resolution of claims related to the violations of this Law and the enforcement of the penalties set forth in Article 21.
3. Hearing, on a first instance basis, the claims requiring a prison sentence by the Agency or the committee formed under Article 20.
4. The Public Prosecution shall be represented before the Grievances Department by the employees appointed by virtue of an order issued by the Minister of Finance .

Article 23

The Implementing Regulations of this Law shall be issued by an order of the Minister of Finance, and shall be published within sixty (60) days from the publication of this Law and shall come into effect on the effective day of this Law.

Article 24

Subject to Article (1), the Companies Law shall apply to all matters not provided for herein if it is deemed applicable to this kind of companies.

Article 25

This Law shall be published in the Official Gazette and shall come into effect after the lapse of ninety (90) days from the date of its publication.

Law On Supervision of Cooperative Insurance Companies Implementing Regulations 2004

Definitions

Article One

The following words and statements mentioned in this implementing regulations, wherever they occur unless otherwise provided in the text, shall have the meanings indicated below:

1. **Actuary:** Person who conduct various statistical and probability theories whereby services are priced; liabilities are assessed and provisions calculated.
2. **Agency:** The Saudi Arabian Monetary Agency.
3. **Beneficiary:** A natural person or juristic entity to whom the benefit(s) under the insurance policy is assigned as a result of a covered loss.
4. **Company:** A public joint stock company conducting insurance and/or reinsurance activities.
5. **Compliance Officer:** A natural person that is concerned with regulatory work to ensure compliance with all rules and regulations.
6. **Contribution (Premium):** Amount offered by the insured to the insurer in exchange for the insurer's acceptance to indemnify the insured for loss / damages resulting directly from a covered risk.
7. **Financial Derivatives:** A contract whose value is based on the performance of an underlying financial assets, indexes, or other investments.
8. **Excess of Loss Reinsurance:** A non- proportional type of reinsurance treaty whereby the insured is required to cede certain risks within specified amounts in excess of the loss amount, which the insurer has agreed to accept. The reinsurer undertakes to accept the insurance on the assigned risks.
9. **Facultative Reinsurance:** An optional case-by-case method of reinsurance. The reinsurer has the option to accept or neglect the offered risks.
10. **Governor:** The Governor of The Saudi Arabian Monetary Agency
11. **Implementing Regulations:** Implementing regulations provisions of the Law on Supervision of Co-operative Insurance Companies promulgated by Royal Decree No. (M/32) dated 2.6.1424 H, corresponding to 31.7.2003.
12. **Insurance:** Mechanism of contractually shifting burdens of pure risks by pooling them.

13. **Insurance Advisor:** A natural person or juristic entity who provides insurance consultative services
14. **Insurance Agency:** A juristic entity that for compensation represents the Company to solicit, procures and negotiates insurance contracts.
15. **Insurance Brokerage:** A juristic entity that for compensation represents insureds or prospective insureds to solicit, procure and negotiate insurance contracts.
16. **Insurance Claims Settlement Specialist (Third Party Administrator) :** A juristic entity that investigates and assesses losses, and negotiates settlements on behalf of the insurance company.
17. **Insurance Policy:** Legal document/contract issued to the insured by the insurer setting out the terms of the contract to indemnify the insured for loss and damages covered by the policy against a premium paid by the insured.
18. **Insurance Services:** Professional activities related to the insurance and reinsurance sector.
19. **Insurance and Reinsurance Services Provider:** A natural person or juristic entity that is licensed to engage in the insurance and reinsurance services or activities, excluding underwriting, permitted in the Saudi Arabia.
20. **Insurance Supervisor:** A government agency or public institution responsible for the supervision and control of the insurance sector.
21. **Insured:** A natural person or juristic entity, which has entered into an insurance contract.
22. **Insurer:** An insurance company that accept insurance contracts directly from insured(s).
23. **Loss Assessor and loss Adjuster:** A juristic entity that examines and inspects the insurance risk before it is insured, inspects the damages after they occur to determine the reasons for the loss, assesses the value thereof, and assigns liabilities.
24. **Person:** A natural person or a juristic entity.
25. **Law:** Law on Supervision of Cooperative Insurance Companies.
26. **Person Providing Insurance and reinsurance Services:** A natural person that is licensed to engage in the insurance and reinsurance services or activities permitted in Saudi Arabia who is employed by an insurance services provider.
27. **Risk:** Situation involving the chance of loss or no loss, but no chance of gain.
28. **Quota-Share Reinsurance:** A proportional type of reinsurance treaty, whereby the insurer is required to cede certain risks within agreed percentages to the reinsurer and the reinsurer has agreed to accept the business.
29. **Reciprocal Exchange:** Unincorporated association with each insured insuring the other insureds within the association. Each participant in this pool is both an insurer and an insured. An attorney in-fact administers the exchange, to include paying losses, investing premium, recruiting new members, underwriting new and renewal business, receiving premium, and exchanging reinsurance contracts. Members share profits and losses in the same proportion

- 30. **Reinsurance:** Transfer of the insured's risk from the insurer to the reinsurer and to indemnify the insurer by the reinsurer for any payments made to the insured against damages or loss.
- 31. **Reinsurer:** an insurance or reinsurance company that accept insurance contracts from another insurer.
- 32. **Retention:** The amount of risk kept by an insurance company in its own books, in comparison with insurance risks ceded to a reinsurance company.
- 33. **Self-Insurance:** Retention of any risk by structured means, i.e. the company that is retaining the risk has set up a fund against a future event that is fortuitous and outside the control of the company.
- 34. **Solvency Margin:** Minimum standard of financial health for an insurance or reinsurance company, where assets exceed liabilities.
- 35. **Statutory Reserves:** Percentage of profit that a company must set aside as provided under Article (15) of the Law.
- 36. **Surplus Distribution:** Method by which profit of insurance and reinsurance companies is distributed among shareholders and policyholders.
- 37. **Technical Provisions (Reserves):** Insurance liabilities, i.e. the value set aside to cover expected losses arising on a book of insurance policies and its financial obligations.
- 38. **Treaty Reinsurance:** Occurs when the primary insurers cede insurance of certain risks within certain amounts & percentages to the reinsurer and the reinsurer has agreed to accept reinsurance of the assigned risks.
- 39. **Underwriting:** The process of evaluating and accepting of insurance.

Objectives of the Law and the Implementing Regulations

Article Two

Objectives of the Law and its Implementing Regulation:

1. Protection of policyholders and shareholders.
2. Encouraging fair and effective competition.
3. Enhancing the stability of the insurance market.
4. Enhancing the insurance sector in the Kingdom, and provide training and employment opportunities to Saudi nationals.
- 5.

Classes of Insurance

Article Three

Insurance is divided into insurance and re-insurance business activities, and it covers the following insurance classes:

First: General Insurance

1. Accident and liability insurance including the following:

- a) Personal Accident Insurance.
- b) Work Related Insurance.
- c) Employer's Liability Insurance.
- d) Third Party Liability Insurance.
- e) General Liability Insurance.
- f) Product Liability Insurance.
- g) Medical liability Insurance.
- h) Professional Liability Insurance.
- i) Theft and Burglary Insurance.
- j) Fidelity Insurance.
- k) Safe Burglary Insurance inside the premises and in transit.
- l) Any other Liability Insurance

2. Motor Insurance: Provides coverage against losses and liability related to motor vehicles, excluding transport insurance.

3. Property Insurance: Provides coverage against fire, theft, explosions, natural phenomena, civil disturbances, and any other insurance included under this class of insurance.

4. **Marine Insurance:** Provides coverage for goods in transit and the vehicles of transportation on waterways, and any other insurance included under this class of insurance.
5. **Aviation Insurance:** Provides coverage for airline hulls and liability against passengers and third parties, freight transport by air, and any other insurance included under this class of insurance.
6. **Energy Insurance:** Provides coverage for oil, petrochemical, other energy installations, and any other insurance included under this class of insurance.
7. **Engineering Insurance:** Provides coverage for builder's risks, construction, mechanical, electrical, electronic, and machinery breakdown, and any other insurance included under this class of insurance.
8. **Other Classes:** includes all recognized classes of general insurance not mentioned above.

Second: Health Insurance

Health insurance provides individual or group coverage for medical costs, medicines, medical and medications requirements as well as management of medical programmes.

Third: Protection and Savings Insurance.

1. **Protection Insurance:** Provides individual or group coverage for death related consequences, and permanent and partial disability.
2. **Protection and Savings Insurance:** Provides individual or group coverage for death related consequences, and permanent and partial disability with a saving / retirement plan for an additional premium paid by the insured.
3. **Other Protection and Savings Insurance:** It includes other classes of insurance in the protection and savings insurance not mentioned above.

Licensing Requirements

Article Four

First: Insurance and/or Reinsurance Companies:

A license application including the following shall be submitted to the Agency:

1. Completed licensing application.
2. Memorandum of Association.
3. Articles of Association
4. Organizational structure
5. Feasibility study.
6. Five-years business plan that shall include as a minimum, the following:
 - a) Classes of insurance that will be undertaken by the Company.
 - b) Ability to cede or accept reinsurance treaties for the classes the company intend to reinsure.
 - c) Marketing plan.
 - d) Projected costs and financing to start the Company's operation.
 - e) Projected underwriting growth taking into consideration solvency margin requirements.

- f) Expected number of employees and a Saudization plan for training and employment.
 - g) Annual cost based on projected growth rate.
 - h) Projected financial statements related to the growth rate.
 - i) Technical Provisions statement for the proposed growth of the insurance operation certified by a qualified Actuary.
 - j) Branching distribution plan in the Kingdom.
7. Any agreements with outside parties.
 8. An Irrevocable bank guarantee issued by one of the local banks for the capital required, such guarantee must be renewed until the capital is paid up.

Second: Insurance and Reinsurance Services Provider:

A license application including the following shall be submitted to the Agency:

1. Completed licensing application.
2. Memorandum of association.
3. Articles of Association.
4. Organizational structure
5. Feasibility study.
6. Three-years business plan that shall include as a minimum, the following:
 - a) Classes of insurance that will be undertaken by the insurance and reinsurance services provider.
 - b) Projected costs and financing to start the operation.
 - c) Projected growth of the business.
 - d) Expected number of employees and a Saudization plan for training and employment.
 - e) Annual cost based on projected growth rate..
 - f) Projected financial statements related to the growth rate.
 - g) Branching distribution Plan in the Kingdom.
7. Any agreements with outside parties.
8. An Irrevocable bank guarantee issued by one of the local banks for the capital required, such guarantee must be renewed until the capital is paid up.

Third: Individuals Providing Insurance and reinsurance Services:

Any individual who wish to practice any of the insurance professions shall obtain a license from the Agency providing that the following requirements are fulfilled:

1. A university degree as a minimum, and five years relevant insurance experience, or an insurance professional designation accepted by the Agency.
2. Pass the examination approved by the Agency to engage in the designated insurance profession, or any other equivalent qualifications acceptable to the Agency.

Article Five

The Agency may apply penalties provided under Article (19) of the insurance law and request application of the penalties stipulated in Article (21) of the insurance law in case of submitting incorrect or false information.

Article Six

1. The Agency shall notify the applicant within 30 working days confirming that the application is complete. Whereby, the application is incomplete the Agency shall notify the applicant of any further requirements or missing documents.
2. All incomplete and/or missing documents shall be provided within 30 working days from the Agency's notification, otherwise the application shall be cancelled and the applicant must re-submit a new application for consideration.
3. The Agency shall notify the applicant within 90 working days from the receipt of a completed application of its approval, or its rejection by providing reasons.

Article Seven

The applicant shall pay the Agency a non-refundable licensing application processing fee of ten thousand Saudi Riyals (SR 10,000). Upon approval of the application, the applicant shall pay the Agency the following licensing fee:

- 2 (SR 100,000) One hundred thousand Saudi Riyals for Insurance Company.
- 3 (SR 200,000) Two hundred thousand Saudi Riyals for Re-insurance Company.
- 4 (SR 300,000) Three hundred thousand Saudi Riyals for Insurance and Re-insurance Company.
- 5 (SR 25,000) Twenty five thousand Saudi Riyals for Insurance and reinsurance Services Providers, except the actuary and the insurance advisor.
- 6 (SR 5,000) Five thousand Saudi Riyals for Actuaries and Insurance Advisors.

Article Eight

Insurance and reinsurance Services shall be provided by a Person licensed in the kingdom with a minimum capital requirement of:

1. (SR 3,000,000) Three million Saudi Riyals for Insurance Brokerage.
2. (SR 3,000,000) Three million Saudi Riyals for Insurance Claims Settlement Specialist (Third Party Administrator).
3. (SR 500,000) Five hundred thousand Saudi Riyals for Insurance Agency.
4. (SR 500,000) Five hundred thousand Saudi Riyals for Loss Assessor and Loss Adjuster.
5. (SR 150,000) One hundred and fifty thousand Saudi Riyals for Insurance Advisor.
6. SR 150,000) One hundred and fifty thousand Saudi Riyals for Actuary.

Article Nine

Insurance and Reinsurance Services Providers shall obtain an insurance policy to cover professional liability risks for negligence, wrongdoing and dereliction of duties with a minimum coverage limit of:

1. (SR 3,000,000) Three million Saudi Riyals for Insurance Brokerage.
2. (SR 6,000,000) Six million Saudi Riyals Reinsurance Brokerage.

3. (SR 1,000,000) One million Saudi Riyals for Insurance Agency.
4. (SR 3,000,000) Three million Saudi Riyals for Actuary or Loss Assessor and Loss Adjuster.
5. (SR 1,000,000) One million Saudi Riyals for Insurance Claims Settlement Specialists (Third Party Administrator).
6. (SR 500,000) Five hundred thousand Saudi Riyals Insurance Advisor.

Article Ten

The founders of the Company, and owners of insurance professions shall be of good conduct and reputation with no convictions by court action affecting their honor and integrity.

Article Eleven

The commercial registration shall be restricted to the licensed insurance activity. The Agency shall be supplied with a copy of such registration and any subsequent renewals thereof. Any other unlicensed activities shall not be practiced.

Regulation of Insurance Operations

Article Twelve

The Company and all Insurance and Reinsurance Services Providers shall conduct their business according to professional and ethical standards.

Article Thirteen

The Company and all Insurance and Reinsurance Services Providers shall comply with all Saudi accounting standards approved by the Agency. In the absence of such standards, the company shall apply international accounting standards.

Article Fourteen

The Company and all Insurance and Reinsurance Services Providers shall obtain prior written approval of the Agency before dealing with Lloyd's insurance brokers or foreign companies to cover risks that cannot be covered through a licensed Company in the Kingdom.

Article Fifteen

The Company and all Insurance and Reinsurance Services Providers, in accordance with all rules and regulations issued by the Agency to that effect, shall:

1. Adopt an internal policy and procedures to combat economic crimes including money laundering.
2. Apply "Know Your Customer" standards.

3. Notify the Financial Intelligence Unit (FIU) in writing of any suspected transactions, in accordance with the designated form designed by the Agency with a copy submitted to the Agency.

Article Sixteen

The Company and all Insurance and Reinsurance Services Providers shall provide complete and accurate information regarding their insurance products and services to the Agency. Written prior approval by the Agency is required for marketing all insurance products and services.

Article Seventeen

The Company shall comply with all conditions set by the Agency for specialized inter-companies insurance funds. No given Company may subscribe to such funds outside the Kingdom without obtaining the Agency's written approval.

Article Eighteen

The company shall provide the Agency with copies of reinsurance agreements on an annual basis. The Agency may comment on these agreements and request amendments if deemed necessary.

Article Nineteen

1. The Company shall not deal with any unlicensed Insurance and Reinsurance Services Providers, and Insurance and Reinsurance Services Providers shall not deal with any unlicensed Person Providing Insurance and reinsurance Services. A signed written agreement outlining the scope and relationship between the Company and Insurance and Reinsurance Services Providers is required.
2. Insurance and Reinsurance Services Providers and their employees shall not deal with an unlicensed Company, and they shall not prejudice other company's products when providing insurance services to the consumers.
3. The Company or an Insurance and Reinsurance Services Providers shall have a valid contract with any Person they are dealing with.

Article Twenty

First: The Company shall appoint an Actuary that holds the designation of a Fellow, or seek the services of an actuary or an actuarial firm after obtaining a written permission from the Agency. The Company's Actuary shall undertake the following duties:

1. Obtain all required information and particulars from the previous Actuary.
2. Examine the Company's financial position.
3. Evaluate the Company's ability to meet its future obligations.
4. Determine adequate risk retention level.
5. Price the Company's insurance product.
6. Determine and approve the Company's technical provisions.
7. Provide advice and recommendations related to the Company's investment policy.
8. Any other actuarial recommendations.

Second: The Actuary shall be professionally liable for his/her advice and technical services provided to the Company, and shall upon the Company's request, furnish the Company's management with the following particulars and documents:

1. Sound actuarial information and statements about the company's present and future financial position.
2. Annual report, within sixty days from the expiry date of the company's fiscal year reflecting the adequacy of the Company's technical provisions.
3. Annual report, within sixty days from the expiry date of the Company's fiscal year reflecting the pricing adequacy of the insurance products.
4. Company's investment returns analysis.
5. Insurance portfolio development analysis.
6. Cost Analysis
7. Report reflecting the adequacy of matching assets with liabilities.
8. Positive and adverse underwriting policy development status.

The Company shall ensure compliance with all required actuarial duties and reports. Otherwise, the Agency shall appoint an actuary at the company's expense to undertake these actuarial duties.

Third: An external auditor shall review actuarial reports that present immediate or future risks facing the Company, and the Agency shall be provided with copies of these reports in a timely manner.

The Company's Actuary shall, in the presence of immediate or future risks facing the Company, submit a report on an urgent basis directly to the company's Board of Directors. The Board of Directors shall examine the report and recommend corrective actions, and forward all related information to the Agency within fifteen days from receiving the report.

Article Twenty-One

The Company that underwrites Protection/Savings insurance business class along with other classes of insurance shall comply with the following requirements:

1. Appoint a qualified risk manager for its Protection/Savings insurance class that is independent from the other classes of insurance business
2. Appoint a qualified reinsurance manager for its Protection/Savings insurance class that is independent from the other classes of insurance business.
3. Separate all investments and provisions for its Protection/Savings insurance business from the other classes of insurance business.

Article Twenty-Two

A Person shall not engage in more than one insurance or reinsurance related service without the written permission of the Agency.

Article Twenty-Three

An Insurance and Reinsurance Services Provider shall have a permanent office where all insurance related registers and documents used in their operations are kept, the Agency must be notified within thirty (30) days of any

changes in the permanent office location. An exception is made for Actuaries and Advisors residing outside the Kingdom with written permission from the Agency.

Article Twenty-Four

Insurance Brokers and Agents shall provide sound advice to the insured and shall disclose all facts and risks associated with the insurance policy that will be issued by the Company.

Article Twenty-Five

Insurance Brokers and Agents shall provide the insured with adequate information regarding the insurance policy and that there must be no inducement or deception. The information provided must include the following as a minimum:

1. Limits of insurance coverages.
2. Policy exclusions.
3. Contribution or Premium amount (s).
4. Inception and expiration dates (policy period) of the policy.
5. Policy conditions.
6. Name of the Company issuing the insurance policy.

Article Twenty-Six

Insurance and/or Reinsurance Brokerages shall:

1. Disclose to the insured the commission and/or fees earned for the services provided.
2. offer to place reinsurance business with local reinsurance Companies' before placement with a foreign reinsurer.
3. Not allow an insurance broker to combine insurance and reinsurance business activities to avoid conflict of interest that is harmful to the policyholder. Commissions and fees of insurance and reinsurance business shall be separated.
4. Serve the insured's interests by striving to obtain the most appropriate available coverage and price.
5. Disclose to the insured in advance all benefits under the policy as compared to other similar policies in terms of coverages and prices.

Corporate Governance

Article Twenty-Seven

Fit and proper standards issued by the Agency shall be applied to the Company's and Insurance and Reinsurance Services Provider's Chairman, Board Members, Directors, and Senior Managers. Designated forms issued for this purpose shall be completed and approved by the Agency.

Article Twenty-Eight

1. The Company's and Insurance and Reinsurance Services Provider's Chairman, Board Members, and Senior Managers must be trustworthy and experienced in financial and insurance business to enable them to carry out their duties in the best possible way.
2. A Company's board members shall not be a member of the board of directors of any other insurance and or reinsurance Company.
3. The Agency may object to the appointment of any of the Board Members, appointed executive managers of the company and of the Insurance and Reinsurance Services Provider.

Article Twenty-Nine

The Company shall not nominate a member to its board of directors or to a senior management position without the written approval of the Agency in the following circumstances:

1. A Person who had held similar position in a liquidated Company.
2. A Person who had been dismissed from a similar position in another Company.

REGULATORY AND SUPERVISORY PROCEDURES

Article Thirty

The Agency's examiners or any person assigned by it shall have the right to conduct office and field examinations of all accounts, records, documents, and transactions related to the insurance affairs of the Company and the Insurance and Reinsurance Services Provider, and their employees shall provide all information, particulars, and documents required by the examiners.

Article Thirty-One

The Company and the Insurance and Reinsurance Services Provider shall co-operate fully with the Agency's examiners, and particularly in the following:

- 13 Enabling the Agency's inspectors to have access to the company's registers, accounts, and other documents in order to carry out their examination;
- 14 Providing the Agency's examiners with all available information and clarifications.
- 15 Revealing to the Agency's examiners any irregularities or violations in the Company's activities upon commencing their assignment;
- 16 The Company and the Insurance and Reinsurance Services Provider's employees are prohibited from concealing or attempting to conceal any information or irregularities, and not replying to any clarifications sought by the examiners.
- 17 Carrying out the recommendations and instructions issued to the Company and to the Insurance and Reinsurance Services Provider as a result of the examination.

Article Thirty-Two

The Company and the Insurance and Reinsurance Services Provider shall comply with the working hours specified by the Agency at its head office and branches in the Kingdom.

Article Thirty-Three

The Company shall comply with the minimum and maximum limits as determined by the Agency for each class of insurance as well as insurance contributions and premiums.

Article Thirty-Four

17 The Company's Board of Directors shall form an audit committee consisting of at least three and no more than five members. from non-executive managers and mostly non-members of the Board of Directors.

18 The Company shall:

- (a) Establish an internal audit department, which shall report directly to the audit committee. The officer in charge of this department must be a holder of a professional certificate in this discipline.
- (b) Establish a regulatory compliance department and appoint a regulatory compliance officer. This office shall verify compliance with all rules, regulations and directives. This office shall be directly affiliated to the audit committee and may contact directly the Agency and provide it with information according to the procedures that it specifies, and report to the internal audit department any indemnity or claim payments which violate the standard technical claim payments.

Article Thirty-Five

No Person shall:

Disclose any information obtained in the course of carrying out any work related to the implementation of any provisions of the Law and this Implementing Regulations except for official purposes.

Seek or obtain personal benefits by taking any action related to the implementation of the Law and this Implementing Regulations.

Article Thirty-six

The Company and the Insurance Brokerage shall pay the costs of inspection and supervision by paying the Agency the following:

1. The Company shall pay five per thousand (0.5%) of total underwritten premiums in a financial year excluding local market share of the reinsurance business.
2. The Insurance/Reinsurance Brokerage shall pay an amount representing one percent (1%) from the total commissions and fees earned within an accounting year.

Article Thirty-Seven

The Company and the Insurance and Reinsurance Services Provider shall set and implement written internal control procedures, the effectiveness of which

shall be valued by the internal and external auditors shall issue and implement written internal audit procedures.

Article Thirty-Eight

1. The Company shall notify the Agency of the percentage of ownership of any Person who owns five percent (5%) or more of the Company through a quarterly report.
2. Any Person owning five percent (5%) or more of the Company's shares shall notify the Agency in writing of their percentage ownership and any changes thereof within 5 working days of the date of occurrence of such event.

Article Thirty-Nine

1. The Agency's written approval is required for any mergers, acquisitions, transfer of ownership, and opening new branches by any Company or Insurance and Reinsurance Services Provider.
2. A written notice to the Agency is required for any mergers and acquisitions between Companies. The written notice to the Agency shall provide the following information:
 - a) Initial agreement
 - b) Financial statements.
 - c) Agreed value:
 - d) Mode of payment; and
 - e) Method of valuation.

The Agency may reject the application if it finds that the value or the valuation method is not appropriate or if it deems that, this action is likely to adversely affect policyholders, the insurance sector and the economy in the Kingdom.

Article Forty

The Company shall:

1. Retain at least thirty percent (30%) of its total insurance premium.
2. Reinsure thirty percent (30%) of its total premium in the Kingdom.
3. The Agency's written approval is required whereby if its difficult for the Company to comply with the above percentages or it wishes to retain a lesser percentage.

The Agency may obligate the Company to reinsure or not reinsure part of its direct insurance business transacted in the Kingdom with a domestically or foreign registered reinsurance company in accordance with the insurance market and each Company's financial position.

Article Forty-One

The Company shall, within one month from the end of each quarter, reconcile policy terms and total coverage issued to the insured with that available from the reinsurer and to take corrective action in case of any differences

Article Forty-Two

1. A Company wishing to engage in reinsurance treaties outside the Kingdom shall ensure that the following criteria are met:
 - ? The foreign reinsurer is licensed and authorized to transact the kinds of insurance proposed in the Kingdom in its country of domicile.

- b) The insurance supervisor of the foreign reinsurer must authorize the exchange of relevant information with the Agency.
- c) The foreign reinsurer must maintain separate records and financial statements of all Saudi operation and be ready to provide the Agency with any related information upon request.
 - d) The Company shall provide the Agency with the reinsurer's financial statements related to the most recent financial year.
 - e) The Company must provide the Agency with the latest regulatory or supervisory report issued by the foreign reinsurer's supervisory authority.
2. The Company shall select a reinsurer, at a minimum, with an S&P Rating of BBB, or its equivalent rating from a recognized international rating organization. If the Company wishes to do business with a re-insurer that is not rated by any international organization or has a rating less than the minimum requirement mentioned above, the Company should obtain prior written approval of the Agency.

Article Forty Three

The Company shall set up a claims' department with procedures for accepting policyholder's claims, claims evaluation and processing. The Company shall maintain records pertaining to policyholder's claims and classify them into paid, unpaid, and rejected claims. Each record shall include the following:

- 1. Insurance application and proposal, if available;
- 2. Copy of the insurance policy;
- 3. Policyholder's claim's information;
- 4. Adjusters and assessor's report and any other documents pertaining to the claim and the direct reason leading to the covered loss;
- 5. Proportional indemnity share of any other insurance and reinsurance policies in effect.
- 6. Action taken by the Company and the status of the claim.
- 7. A power-of-attorney from the Insured to the Company to subrogate it in the following cases:
 - a) Third party Liability for the Loss.
 - b) Defending the insured in repudiate liability or in determining the indemnity amount.
- 9. Signed settlement agreement by a Person for a paid claim.

Article Forty-Four

The Company shall settle individual policyholder's claims in a period not to exceed fifteen (15) days from the date of receiving all requested and necessary documentation related to the claim, another fifteen (15) day period shall be extended with a notification to the regulatory compliance officer with reason(s) of such extension. The Company shall settle commercial entities' claims in a period not to exceed forty-five (45) days after receipt of all requested and necessary documentation including the report of the loss assessor who must be appointed by the company within one week from the

loss notification's date. If this period is exceeded, the regulatory compliance officer must be notified and provided with reason(s) for such delay.

Article Forty-Five

The Company and the Insurance and Reinsurance Services Provider shall respond to policyholder's complaints within fifteen days. All complaints shall be entered into a registry that is designated for this purpose. All complaints in the registry must contain all necessary and material information. A semi-annual report shall be prepared and forwarded to the Audit committee with all complaints referred or will be referred in the future for litigation purposes.

Article Forty-Six

The Company shall adhere to principles set forth in this article when pricing insurance policies:

1. Pricing shall be fair, reasonable and adequate;
2. Pricing shall be set in accordance with the Company's underwriting guidelines with adequacy and appropriateness to the risks undertaken by the Company, and in accordance with appropriate technical reserves.
3. Providing the Agency with justifications and basis used in setting prices. These prices shall not be relied upon other Company's pricing.

Article Forty-Seven

The Company shall evaluate the adequacy of its technical provisions on a quarterly basis. The minimum capital requirement shall be used to cover policyholders' claims in the case whereby the technical reserves are deficient to meet the Company's claims obligations. The Agency must be notified if such deficiencies exist.

Article Forty-Eight

The Company's gross written premium shall not exceed Ten (10) times the paid capital and reserves without the Agency's written approval.

Article Forty-Nine

No insurance policy shall be issued or renewed to any of the Company's members of the Board of Directors, Senior and Executive Managers, and their related parties except after the payment of the full premium. Claims submitted for payment on their behalf shall be treated in accordance with procedures and rules set forth by the Company without any exception or preference. The Compliance Officer shall be notified of any related claims payment.

Article Fifty

The Company and the Insurance and Reinsurance Services Provider shall, within forty-five (45) days from the end of each year, provide the Agency with the following particulars:

1. Report identifying the names of members of the Board of Directors, managing directors, general managers, senior managers in all branches and affiliates and foreign representative offices, including the names and current positions and dates of appointment and the number of years of service in the company.

2. Report identifying the percentages of Saudi and non-Saudi employees on the Company, Branch, and departments levels including the managerial positions held by Saudis.
3. Any other particulars requested by the Agency.

Article Fifty-One

The Company shall adhere to minimum coverage issued and/or approved by the Agency for all classes of insurance. The insurance policy must specify all related coverage benefits. The Company must provide the technical and pricing basis for its insurance products. In respect of protection and savings insurance, such technical basis and pricing must be prepared and/or approved by an Actuary.

Article Fifty-two

The Insurance Policy shall be written in a clear way that can be read by the public at large, and shall contain the following:

1. The policy schedule must specify the following as a minimum:
 - a) Policy number, which must also be provided in all related document to this policy.
 - b) Policyholder's name and mailing address.
 - c) Coverage period.
 - d) Coverage descriptions and limits.
 - e) Deductibles and Retentions.
 - f) Endorsements, Warranties, and Riders.
 - g) Conditions and Exclusion.
 - h) Insurance rates and premium amounts, basis of premium calculation and the amount of commission paid under the policy.
 - i) Identification of the property or activities to be insured.
2. The standard text of the policy shall contain the type of coverages, general terms, conditions, and exclusions.
3. Endorsements and riders shall indicate additional coverages, conditions, and exclusions not mentioned above and which are different from the main agreement.
4. The Company's signature and seal shall be on the policy and its attachments.

Article Fifty-Three

1. The Company shall, before issuing an insurance policy, give the policyholder access to the terms, conditions and exclusions of the policy.
2. Upon acceptance of the insurance application, the Company shall issue the client a binder/cover note as a temporary insurance document until the policy is issued. The Binder shall reflect all insurance coverages provided by the policy for a period not exceeding thirty (30) days from the commencement of coverage.

3. An insurance policy shall be amended by virtue of a written request submitted by the policyholder followed by an addendum issued by the Company.

Article Fifty-Four

1. The Company shall not cancel a valid insurance policy except for conditions stated in the policy cancellation clause. In case of a cancellation of the policy, the company shall refund the premium on a pro-rata basis. The company shall afford the policyholder a minimum period of thirty days (30) before the effective date of cancellation by the company.
2. The policyholder may cancel the insurance policy and recover part of the paid premium, on a short rate basis, provided there are no unpaid or outstanding claims.

Article Fifty-Five

The basis of the information provided in the policy shall be the application submitted by the policyholder. When completing the insurance application, the following must be taken into consideration:

1. Insurable interest.
2. Providing all material facts related to the insurance policy.
3. Indemnification of the policyholder based on the insurance policy shall be the purpose of the insurance and/or reinsurance policy.
4. Insurance provided must not violate any rules, regulations, and directives.

Article Fifty-Six

The Company shall provide credible reasons for denying, canceling, and non-renewing insurance policies without discrimination and unfair treatment between policyholders, and shall not rely on decisions of other companies for its actions.

Article Fifty-Seven

The Company shall notify the Agency of all insurance related benefits and incentives schemes provided to its employees.

STATUTORY DEPOSIT

Article Fifty-Eight

The statutory deposit shall be ten percent (10%) of the paid up capital. The Agency, where the risk profile of the Company's business warrants it, shall increase this percentage to a maximum of fifteen percent (15%). The Company shall place the statutory deposit amount, within three (3) months period from the date of issuing the license, in a bank designated by the Agency. The Agency shall invest the statutory deposit and shall be entitled to its earnings.

INVESTMENT

Article Fifty-Nine

The Company shall:

1. Formulate a written investment policy, approved by the Board of Directors, which governs its investment operations and the methods of managing its investment portfolios.
2. The company shall invest 50% of its total invested assets in Saudi Riyals.

The Agency's written approval is required if the Company wishes to reduce this percentage.

Article Sixty

The Company shall have a written investment diversification policy taking into consideration all risks faced by the company and the environment that it operates under. The Company shall take the necessary measures to manage the following risks as a minimum:

1. Market risk.
2. Credit risk.
3. Interest rate risk.
4. Currency exchange risk.
5. Liquidity risk.
6. Operations risk.
7. Country risk.
8. Regulatory and legal risk.
9. Re-insurance risk.
10. Technology Risk.

Article Sixty-One

1. The Company shall, when formulating its investment policy, take into consideration that the maturity of its invested assets is in concurrence with its liabilities according to the issued policies. The Company shall provide the Agency with an investment policy inclusive of assets distribution. If such investment policy was not approved by the Agency, the Company shall adhere to the investment standards in Table (1), provided that investments outside the Kingdom shall not exceed 20% of the total investment and in accordance with Article 59 (2).
2. The Company shall take in consideration the investment concentration risks. Concentration in an investment instrument shall not exceed 50% in one investment instrument mentioned in table (1).

Article Sixty-Two

The Company shall not use financial instruments, such as derivatives and off-balance-sheet items, other than for efficient portfolio management and with the Agency's written approval. The Company is permitted to invest in such instruments when these conditions are met:

1. Such derivatives must be listed on a financial exchange, are capable of being readily closed out, are based on underlying admissible assets and have a prescribed pricing basis.

2. The company has set aside assets that can be used to settle any obligations under these derivatives and set adequate provisions for any adverse changes on the derivatives and their coverage.
3. The counter party must be reputable and in an acceptable financial condition.

Asset Valuation and Solvency Margin

Article Sixty-Three

Whereby a Company conducts general insurance business and protection and saving insurance business, the assets of each class of insurance must be considered separately.

Article Sixty-Four

The Company shall not consider assets obtained from the issuance of bonds or from obtaining loans in its solvency margin calculations without the Agency's written approval.

Article Sixty-Five

The Company's shall value its assets for the purpose of calculating the solvency margin according to Table (2) provided that the following are observed:

1. Market value shall not be exceeded in the valuation process and all assets linked to the Investment part of the Protection and Savings insurance policy shall be excluded.
2. Maximum limit of 20% of the total assets value in any one-asset category.

Article Sixty-Six

1. The Company, in respect to its general and health insurance business, shall maintain a margin of solvency equivalent to the highest of the following three amounts:
 - a) Minimum Capital Requirement.
 - b) Premium Solvency Margin.
 - c) Claims Solvency Margin

As an exception to the preceding, Premium Solvency Margin, method shall be used to calculate the solvency margin for the first three years of the company's registration.

2. Solvency Margin calculations:

First: Premium Solvency Margin:

1. Dividing gross premiums written into the categories set out in Table (3).
2. Deducting the outwards reinsurance relating to the gross premiums determined in (1) above, provided that in all cases the net premiums written is not less than 50% of gross premiums written.

3. Multiplying the net premiums written for each category by relevant factors set out in Table 3 and aggregating the result for each category to come out with the appropriate solvency margin.

Second: Claims Solvency Margin:

1. Dividing average gross claims incurred over the three most recent financial claims into categories set out in Table 4 of this Article.
2. Deducting the outwards reinsurance relating to the gross claims determined in (1) above, provided that in all cases the net claims amount is not less than 50% of gross claims amount.
3. Multiplying the net claims by (2) above for each category by the relevant factors set out in Table 4 and aggregating the result for each category to come out with the appropriate solvency margin.

Article Sixty Seven

The solvency margin for the Protection and Saving Insurance business shall be determined by taking the aggregate of the results arrived through the calculation described below:

1. Four percent (4%) of the technical provisions for the protection and saving direct insurance.
2. Three per thousand (3/1000) of the Capital at Risk for individual policies after the deduction of reinsurance cessions, provided that the reinsurance amount do not exceed 50% of the total Capital at Risk.
3. One per thousand (1/1000) of the Capital at Risk For group policies after the deduction of reinsurance cessions, provided that the reinsurance amount do not exceed 50% of the total Capital at Risk.

Article Sixty-Eight

1. The Company shall complete all forms related to the actual and required solvency margin calculations.
2. The Company shall maintain a solvency margin according to the standards specified, and implement the following measures when its solvency margin falls below the required margin (s):
 - a. The Company shall restore, in a period not exceeding the next financial quarter, its solvency margin when it falls between the ranges of 75% to 100% of the required solvency margin.
 - b. The Company shall restore its solvency margin when it falls between 50% and 75% of the required margin. The company shall apply measures stated in paragraph (a) of this Article. If the required solvency margin is not restored to its appropriate level for two consecutive financial quarters, the company shall formulate and provide the Agency with a corrective action plan to be taken and the period necessary to restore its solvency.
 - c. The Company shall restore its solvency margin when it falls between 25% and 50% of the required margin. The Company shall apply measures stated in paragraph (b) of this Article. If the required solvency margin is not restored to its appropriate level for two consecutive quarters, the company will be

required by the Agency to take all or any of the following measures immediately:

1. Increase the Company's capital.
 2. Adjust insurance premiums
 3. Reduce costs;
 4. Stop underwriting business.
 5. Assets liquidation.
 6. Any other measures deemed appropriate by the Company and approved by the Agency
- d. The Agency shall appoint an advisor to provide consultation and advice to the company or issue a cease and desist order to the Company and recommend the withdrawal of its license if the solvency margin falls below 25% and/or the Company fails to act appropriately to rectify its financial situation.

TECHNICAL PROVISIONS

Article Sixty-Nine

1. Technical provisions must be calculated in accordance with acceptable accounting standards, and approved by an actuary reflecting the company's obligations, and shall include the following technical provisions as a minimum:

- a) Unearned Premium Reserves
 - b) Unpaid Claim Reserves
 - c) Claims Expense Reserves.
 - d) Incurred but not reported Claims Reserves.
 - e) Unexpired Risk Reserves.
 - f) Catastrophe Risk Reserves.
 - g) General Expense Reserves.
 - h) Reserves related to protection and savings insurance, such as disability, old age, health, death, medical expenses...etc.
2. Reserves shall be calculated, as a minimum, in the following manner:
- a) Unearned Premium Reserves shall represent the unearned portion of gross premiums at the time of valuation and shall be calculated according to the following:
 1. Last three months for marine transport.
 2. 365 days pro rata calculations for all other classes of insurance or 40% of gross premiums.
 - c) Unpaid and Expense Claims Reserves shall be determined as a total value of all outstanding claims and related expenses for each class of insurance business.
 - d) Incurred but not reported Claims Reserves shall be calculated from the total outstanding claims after deducting the reinsurance portion of claims proceeds and according to the following:

1. Fifteen percent (15%) of motor insurance, medical insurance, property insurance, engineering, energy and general accident insurance (excluding liability and personal injuries).

2. Twenty percent (20%) of liability and other insurance.

3. Twenty-five percent (25%) of reinsurance accepted from other insurance companies.

In case of non-compliance, the Agency shall be provided with actuarially justified methods to determine these reserves listed in this article.

d) Doubtful debt reserves shall be calculated as follow:

1. Ten percent (10%) of the total amounts due from reinsurers exceeding 180 days.
2. Fifteen percent (15%) of the total amounts due from the insured exceeding 90 days.
3. Twenty-five percent (25%) of the total amounts due from the insured exceeding 180 days.
4. Seventy-five percent (75%) of the total amounts of uncollected receivables exceeding 360 days.
5. One hundred percent (100%) of any disputed and uncollected receivables.

3. General reserves specified in view of the company's experience.

DISTRIBUTION OF SURPLUS

Article Seventy

1. The Company's financial statements, at a minimum, shall consist of; statements of financial position for insurance operations and shareholders accounts, profit and loss statements for insurance operations, shareholders' income statements, statement of shareholders' equity, statements of cash flows for insurance operations and shareholders' cash flow statement.

2. The following shall be regarded by the Company upon preparation of the statements of insurance operations:

- a) Determine earned premiums, and income generated from re-insurance commissions, and other insurance operations revenues.
- b) Determine the incurred indemnification.
- c) At the end of each year, the total surplus representing the difference between (a) and (b), less any marketing, administrative expenses, the necessary technical provisions, and other general expenses related to the operation of insurance shall be specified.
- d) Company's net surplus shall be determined by adding or subtracting the investment return of the policyholder's invested funds, and subtracting the general expenses related to the policyholder's portion of the investment activities.

- e) 10% of the net surplus shall be distributed to the policyholders directly, or in the form of reduction in premiums for the next year. The remaining 90% of the net surplus shall be transferred to the shareholders' income statement.
 - f) The shareholder's net income shall be transferred to the statement of shareholders' equity.
 - g) Twenty percent (20%) of the net shareholders' income shall be set aside as a statutory reserve until this reserve amounts to 100% of the paid capital, and
3. The Agency's written approval must be obtained for policyholders' net surplus distribution and timing.

Registers

Article Seventy-One

The Company shall maintain separate registers for each class of insurance as follows:

1. Policy Register: such register shall include the following particulars:
 - a) Policy number and issuance date.
 - b) Policy period (effective and expiration date)
 - c) Insured's name and address.
 - d) Property or activity to be insured.
 - e) Type of risk.
 - f) Insurance premium.
 - g) Paid premium.
 - h) Endorsements, riders, warranties, and amendments made to the policy.
 - i) Other particulars deemed necessary by the Company.
3. Claims Register: such register shall include the following particulars:
 - a) Claims number and date reported.
 - b) Policy number and period of insurance.
 - c) Insured's name.
 - d) Date and place of the loss and the type of claim.
 - e) Technical reserves estimated and any other changes.
 - f) Claims payments date and amount.
 - g) Closed claims and the reasons for such closure.
 - h) Unpaid (outstanding) claims.
 - i) Disputed claims and any action taken in respect thereof.
 - j) Subrogation recoveries, salvage return, or any other recoveries excluding reinsurance.
 - k) Other particulars deemed necessary by the Company.
4. Reinsurance Register: such register shall include the following particulars:
 - a) Reinsurance treaties and agreements given that; the period for each agreement and the changes made thereto shall be stated separately with the capacity and type of each agreement, the names and ceded percentage or amount for each reinsurer and the company's retention percentage or

amount for each class of insurance, and summary of all reinsurance agreements and other particulars deem necessary by the company.

- b) Reinsurance ceding statements.
 - c) Claims register for reinsurance paid and outstanding claims.
4. The Company shall maintain an underwriting register for each class of insurance.
 5. Insurance Professions Register: It shall include names of any Person engaged in insurance activities that the company is dealing with, their commercial registration, period of contacts, and the nature of the agreement and any other particulars deemed necessary by the Company.

STATEMENTS AND REPORTS

Article Seventy-Two

The Company and the Insurance and Reinsurance Services Provider shall provide the Agency with all particulars and information in accordance with the Agency's published guidelines to effectively conduct its supervisory duty.

Article Seventy-Three

1. The Company and the Insurance and Reinsurance Services Provider shall provide the Agency with financial statements audited by licensed certified public accountant in the Kingdom within 90 days from the end of the financial year of the company including as minimum income statement, financial position and cash flow statement.
2. The Company and the Insurance and Reinsurance Services Provider shall provide the Agency with the report of the certified public accountant and the financial statements within a maximum period of 60 days from the end of the financial year of the company for approval before publication.
3. The Company and the Insurance and Reinsurance Services Provider shall direct their auditors to submit to the Agency the management letter before publication of the financial statements.

Article Seventy-Four

Insurance Brokerage and Insurance Agency shall provide The Agency with the following particulars and information:

1. Semi-annual statement of all underwriting transactions and premium generated through their insurance and reinsurance business.
2. Detailed semi-annual statement reflecting the Company's uncollected premium.
3. Semi-annual statement of earned commissions and fees.

Cease and Desist Orders

Article Seventy-Five

1. The Company and the Insurance and Reinsurance Services Provider shall submit in writing to the Agency its intentions to cease its insurance activities in any one class or classes of insurance in the Kingdom accompanied the following particulars:
 - a) Reasons for such cessation
 - b) Evidence that they have fully discharged their obligation toward their clients and policyholders, they have set aside adequate reserves to meet their obligations, and they have transferred all policies in force to another Company or Insurance and Reinsurance Services Provider.
 - c) The wording of the cessation notice before publishing in two of the local newspapers that shall state their intention to cease operations in one class or classes of insurance and that policyholder's and interested parties shall file their objections to the Agency within a period not exceeding three months from the publishing date of the notice.
2. The Agency's written approval shall be obtained before cessation of operations.

Article Seventy-Six

1. The Agency shall request the license withdrawal of the Company or the Insurance and Reinsurance Services Provider in the following cases:
 - a) No business activities for a period of six months from the issuance date of the license.
 - b) None compliance with the Law and this Implementing Regulations.
 - c) Providing the Agency with false information in its licensing application
 - d) Conducting its business and affairs in a manner that threatens to make it insolvent or that it is hazardous to its policyholders, stockholders, or the public.
 - e) Insolvency, or its assets are not sufficient for carrying on its business.
 - f) The business is fraudulently conducted.
 - g) The paid up capital falls below the prescribed minimum limit or failure to fulfill the provisions of Article 68.
 - h) The business or volume of activities falls to a limit that the Agency finds unviable to operate under.
 - i) Refusal or delay of payments due to beneficiaries without just cause.
 - j) Refusal to be examined or to produce its accounts, records, or files for examination by the Agency.
 - k) Failure to pay a final judgment against it related to its insurance operation.
2. In case of license withdrawal, the Company's or the Insurance and Reinsurance Services Provider's responsibility towards its policyholders shall

be transferred to another licensed entity chosen by the beneficiaries with the approval of the Agency.

3. The Agency shall supervise all settlements related to existing insurance policies where a Company's business activities and status fall under this Article.

Qualification and Training

Article Seventy-Seven

The Company and Insurance and Reinsurance Services Provider shall qualify their employees to undertake duties related to insurance work.

Article Seventy-Eight

The Agency shall set the minimum educational requirements related to the licensing and examination of a Person Providing Insurance and Reinsurance Services.

General Provisions

Article Seventy-Nine

The percentage of Saudi Employees shall not be less than 30% at the end of the first year, and this percentage shall increase annually according to a Saudization plan submitted to the Agency.

Article Eighty

The Company and Insurance and Reinsurance Services Provider's advertising materials shall not contain any false, deceptive or misleading representations, whether they are related to price or their financial and economical position. They shall not include statements in their advertisement material that would appear to defame and cause prejudice to the interests, products and services of others.

Article Eighty-One

No Person shall introduce a pension plan, or a reciprocal exchange, or a Self-Insurance scheme without the prior written approval of the Agency.

Article Eighty-Two

The Governor shall issue all insurance related regulatory and supervisory instructions and procedures.

Article Eighty-Three

A technical Committee or Committees may be formed to improve the development of the insurance sector by a decision from the Governor.

Article Eighty-Four

This Implementing Regulations shall be effective from its publishing date in the official Gazette. The Agency shall review and recommend amendments thereof every three years or when such amendments are deemed necessary.

Table (1)

Investment Type	Percentage for General Insurance	Percentage for Protection and Savings Insurance
Saudi Authorized Banks	20% minimum	10% minimum
Saudi Government Bonds	20% minimum	10% minimum
Saudi Riyals Denominated Investment Funds	10% maximum	15% maximum
Foreign Currency Denominated Investment Funds	10% maximum	10% maximum
Foreign Government's Bonds (Zone A)	5% maximum	5% maximum
Bonds Issued By Domestic Companies	5% maximum	5% maximum
Bonds Issued By Foreign Companies	5% maximum	5% maximum
Equities	15% maximum	15% maximum
Real Estate in Saudi Arabia	0%	5% maximum
Loans Secured by Real estate Mortgages	0%	5% maximum
Loans Secured by Policies Issued by the Insurer	0%	5% maximum
Other Investments	15% maximum	15% maximum

Table (2)

Type of Assets	Admissible%
Land and properties as evaluated by a qualified real estate agency by the end of the financial year as it relate to protection and savings insurance only.	5%
Land and properties as evaluated by a qualified real estate agency by the end of the financial year as it relate to general insurance only.	0%
Securities issued by one of the shareholding companies listed on a Saudi Stock Exchange.	5%
Securities issued by one of the shareholding companies not listed on a Saudi Stock Exchange.	1%
Saudi Government Development Bonds. (SGDB)	100%
Government bonds issued by (A) rated countries.	100%
Bonds issued by one financial institution.	5%
Deposits with any one of the financial institutions licensed in the Kingdom.	10%
Loans secured by policies of insurance issued by the insurer.	5%
Rights under derivative contracts.	1%
Reinsurance balances	100%
All debts due or to become due from individual other than those relating to loans secured by mortgages.	5%
Cash in hand	1%
Accrued interest and rent.	2.5%
Cash in banks	100%
Other pre-payments and accrued income.	2.5%
Deferred acquisition costs	100%
Prepaid expenses	2.5%
Premiums due within 90 days for general insurance companies	100%
Premiums due for protection and savings insurance companies	100%
Tangible assets (i.e. office furniture, equipment, vehicles, computers, etc, excluding rare art work)	2.5%
Intangible assets (i.e. good will, incorporation expenses, registered mark, etc)	0
Personal loans or benefits for employees and managers	0
Treasury stock's	0

Table (3)

Description	Factor
Health insurance	16%
Motor insurance	20%
Fire insurance	16%
Transport Insurance (Liability)	30%
Other Insurance Liability (Liability)	30%
Engineering Insurance	30%
Marine Insurance (vessels, goods)	30%
Aviation Insurance	30%
Energy Insurance	30%
Other classes of insurance except protection and savings insurance	16%
Facultative and treaty re-insurance for all other classes of insurance	30%

Table (4)

Classes of Insurance	Factor
Health insurance	24%
Motor insurance	25%
Fire insurance	20%
Transport Insurance (Liability)	35%
Other Insurance Liability (Liability)	35%
Engineering Insurance	30%
Marine Insurance (vessels, goods)	30%
Aviation Insurance	30%
Energy Insurance	30%
Other classes of insurance except protection and savings insurance	20%
Facultative and treaty re-insurance for all other classes of insurance	50%

Insurance Market Code Of Conduct Regulation 2008



Insurance Supervision Department

إدارة مراقبة التأمين

INSURANCE MARKET CODE OF CONDUCT REGULATION

اللائحة التنظيمية لسلوكيات سوق التأمين

Version 2 (August 2008)



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related service providers including insurance brokerages, insurance agencies, insurance claims settlement specialists, loss assessors (loss adjusters), and insurance advisors.

وسطاء ووكلاء التأمين وأخصائيي تسوية المطالبات التأمينية وخبراء المعاينة ومقدري الخسائر ومستشاري التأمين.

6. Reinsurance activities are exempted from the provisions of This Code.

٦. لا تنطبق هذه اللائحة على أنشطة إعادة التأمين.

Compliance Measures

إجراءات الالتزام

7. Companies must establish appropriate internal controls and procedures to ensure and monitor compliance with This Code, including the compliance of all contracted parties, in particular when there is clear evidence of a breach in the market conduct regulation.

٧. يجب على الشركات أن تضع إجراءات المراقبة الداخلية المناسبة لضمان متابعة الالتزام بهذه اللائحة. وفي حالة تعاقدها مع أطراف أخرى، فيجب عليها التأكد من التزام كافة الأطراف بهذه اللائحة وبالأخص عند وجود مخالفة واضحة من أحد الأطراف المتعاقدة معها.

8. Companies must maintain adequate records to demonstrate compliance with This Code, including but not limited to, reasons for early termination or non-renewal of insurance policies, claims records and complaints records for a minimum period of ten (10) years.

٨. يجب أن تحتفظ الشركات بسجلات ملائمة لإثبات التزامها بهذه اللائحة، على سبيل المثال لا الحصر أسباب الإلغاء المبكر لوثائق التأمين أو عدم تجديدها، وسجلات المطالبات، وسجلات الشكاوى، وذلك لمدة عشر (١٠) سنوات كحد أدنى.

Supervision of Other Contracted Companies

مراقبة التزام الشركات المتعاقدة معها

Non-Compliance

عدم الالتزام

9. Non-compliance with the requirements set forth in This Code will be deemed a breach of the Law on Supervision of Cooperative Insurance Companies and its Implementing Regulations and the licensing conditions and may subject the companies to enforcement action.

٩. يعتبر عدم الالتزام بالمتطلبات المنصوص عليها في هذه اللائحة مخالفا لنظام مراقبة شركات التأمين التعاوني ولائحته التنفيذية ولشروط التصريح ويمكن أن يُعرض الشركة للعقوبات النظامية.

Structure of This Code

هيكل هذه اللائحة

10. The market conduct requirements are outlined in Parts 2 and 3 of this Code:

١٠. متطلبات لائحة سلوكيات السوق مبينة في البابين الثاني والثالث من هذه اللائحة:

- a) Part 2 – General Requirements, which are principle-based.
b) Part 3 – Market Conduct Standards, which stipulate the companies' minimum conduct requirements across the customer relationship

أ) الباب الثاني – المتطلبات العامة: تستند على مبادئ عامة.
ب) الباب الثالث – معايير سلوكيات السوق: تستند على الشركات حداً أدنى من المتطلبات والإرشادات للبيع والتسويق طوال فترة العلاقة مع العميل قبل وخلال



lifecycle, which includes pre-sale, sale, and post-sale conduct guidelines.

وبعد البيع.

Part 2: General Requirements

الباب الثاني: المتطلبات العامة

Integrity

النزاهة

11. Companies must act in an honest, transparent and fair manner, and fulfill all of their obligations to customers, which they have under the laws, regulations, and SAMA guidelines. Where these obligations have not been fully codified, companies may follow internationally accepted best practices.

١١. يجب أن تعمل الشركات بأمانة وشفافية وعدل، وأن تفي بكافة الالتزامات التي عليها للعملاء بموجب الأنظمة، واللوائح، وتعليمات المؤسسة. وإذا كانت هذه الالتزامات غير مدونة في هذه اللائحة أو في نظام مراقبة شركات التأمين التعاوني ولائحته التنفيذية بشكل كامل، فيجوز للشركات أن تتبع أفضل الممارسات المقبولة دولياً.

Skill, Care, and Diligence

المهارة والحرص والعناية

12. Companies must act within their area of competence in dealing with customers. For this purpose, competence is acquired through training, experience, and working with experts in the field. Also, it is the duty of each company to keep their, and their employees' skills and knowledge of the insurance business up-to-date and be informed of the products and services offered by the company, or companies, they represent and the intended use of these products and services.

١٢. يجب أن تعمل الشركات ضمن مجال اختصاصها في التعامل مع العملاء وفقاً للمهارات المهنية اللازمة وبأقصى عناية والحرص على رفع الكفاءة من خلال التدريب والخبرة والعمل مع الخبراء في هذا المجال. وإن من واجب كل شركة مصرح لها أن تحافظ هي وموظفيها على تطوير المهارات وتحديث المعرفة في مجال نشاط التأمين، وأن تكون مطلعة على المنتجات والخدمات المقدمة من الشركة أو الشركات التي تمثلها وأن تكون أيضاً مطلعة على الاستخدام المقصود من هذه المنتجات والخدمات.

Non-Discrimination

عدم التمييز والتفضيل

13. Companies should not unfairly discriminate between customers; treatment should not differ based on customer (existing or potential) race or gender. Companies must provide credible reasons for denying, canceling, and not renewing insurance policies. Furthermore, these reasons should be detailed in the customer's file and be made available to SAMA upon request.

١٣. يجب ألا تُميّز الشركات في التعامل بين عملائها (الحاليين أو في المستقبل) بشكل غير عادل، بناءً على العرق أو الجنس. ويجب على الشركات أن تقدم أسباب مقنعة لرفض أو إلغاء أو عدم تجديد وثائق التأمين، وأن تحتفظ بهذه الأسباب مكتوبة في ملف العميل وتكون متاحة للمؤسسة عند الطلب.

Adequate Resources

موارد كافية

14. Companies must take reasonable care in maintaining adequate managerial, financial, operational, and human

١٤. يجب أن تبذل الشركات عناية معقولة للمحافظة على موارد إدارية ومالية وتشغيلية وبشرية كافية



resources to carry out their business and serve their customers.

للقيام بأعمالها وخدمة عملائها.

Disclosure Information to Customers

إفصاح المعلومات للعملاء

15. Companies must communicate all relevant information to customers in a timely manner to enable them to make informed decisions.
16. Companies must take reasonable measures to ensure the accuracy and clarity of the information provided to customers and make such information available in writing.

١٥. يجب أن تبلغ الشركات العملاء بكافة المعلومات ذات العلاقة في الوقت المناسب حتى يكون بمقدورهم اتخاذ قرارات مناسبة ومبينة على معلومات كافية.

١٦. يجب أن تتخذ الشركات إجراءات معقولة لضمان دقة ووضوح المعلومات المقدمة للعملاء وجعل هذه المعلومات متوفرة كتابياً.

Data Protection

حماية البيانات

17. Companies must, at all times, ensure that customer personal data is protected. This means that the data:

١٧. يجب على الشركات التأكد، في جميع الأوقات، من حماية البيانات الشخصية للعملاء. وهذا يعني أن البيانات:

- a) Must be obtained and used only for specified and lawful purposes.
- b) Must be kept by the company in the Kingdom.
- c) Must be kept secure (e.g., original hard copies or scanned copy of the original hard copies saved in electronic files) and up to date for a period of ten (10) years.
- d) Must be provided to the customer upon his written request.
- e) Must not be disclosed to any third party, without prior authorization from SAMA, other than the companies' auditors, actuaries, reinsurers, and co-insurers.

(أ) يجب الحصول عليها واستخدامها فقط لأغراض محددة ونظامية.

(ب) يجب أن تحفظ في المملكة من قبل الشركة.

(ج) يجب أن تحفظ في مكان آمن وأن تكون محدثة، على سبيل المثال لا الحصر حفظ النسخة الأصلية أو صورة ممسوحة ضوئياً منها في الملفات الإلكترونية ومحدثة لفترة عشر (١٠) سنوات.

(د) يجب أن تقدم للعميل عند تقديمه طلب خطي بذلك.

(هـ) يجب ألا تُفصح لأي طرف ثالث دون تصريح مسبق من المؤسسة، باستثناء مراقبي حسابات الشركات والخبراء الإكتواريين وشركات إعادة التأمين وشركات التأمين المشتركة.

When dealing with a third party (e.g., outsourcing), the company must set up data confidentiality agreements with the third party before initiating the business relationship.

عند التعامل مع طرف ثالث- على سبيل المثال لا الحصر الاستعانة بمصادر خارجية- يجب على الشركات وضع اتفاقيات سرية قبل البدء بالعمل.



Security of Customer' Assets

ضمان أموال العميل (الأقساط)

18. Companies must ensure the security of customers' assets held on their behalf. Any premiums collected by the broker or agent must either be placed in a separate bank account (the premium account) that has been established for that purpose, or passed directly to the insurance company as is required under the contractual arrangement with the insurance company. The only payments that can be deducted from the premium account are:

- Premium payments to an insurance company.
- Commission payments where the insurance company authorizes the broker or agent to make premium payments net of commission.

The premium account must not be treated as the property of the broker or agent in any sense. In particular, it must not be used as security for any loan, and it must be clearly beyond the reach of the broker or agent's creditors.

١٨. يجب أن تضمن الشركات حماية أموال العملاء التي تحتفظ بها نيابة عنهم. ويجب وضع أية أقساط تأمين يحصلها الوسيط أو الوكيل في حساب مصرفي مستقل (حساب أقساط التأمين) الذي تم إيجاده لهذا الغرض، أو يرسل مباشرة لشركة التأمين حسب ما يقتضيه الترتيب التعاقدية مع شركة التأمين. أما بالنسبة للمدفوعات التي يمكن حسمها من حساب أقساط التأمين فهي:

أ) مبالغ الأقساط لشركة التأمين.

ب) مبالغ العمولة حينما تقوم شركة التأمين بتقويض الوسيط أو الوكيل حسم العمولة من أقساط التأمين مباشرة.

ويجب ألا يعامل حساب أقساط التأمين على أنه من أموال الوسيط أو الوكيل في أي حال من الأحوال. وعلى وجه الخصوص، يجب ألا يستخدم هذا الحساب كضمان لأي قرض، كما يجب أن يكون بعيداً عن متناول دائني الوسيط أو دائني الوكيل.

Conflict of Interest

تضارب المصالح

19. Companies should take reasonable measures to identify and address conflicts of interest to ensure fair treatment to all customers. Where conflicts of interest arise, the companies must disclose such conflicts to the customer and must not unfairly place its interests above those of its customer.

١٩. يجب على الشركات أن تتخذ إجراءات معقولة لتحديد أي تضارب في المصالح ومعالجتها لضمان التعامل العادل مع كافة العملاء. وعندما ينشأ تضارب في المصالح، يجب على الشركة أن تفصح للعميل عن هذا التضارب ويجب ألا تقدم مصالحها على مصالح العميل على نحو غير عادل.

Contracting Service Providers

التعاقد مع الشركات الأخرى

20. Companies that use the services of other parties, including other companies, must have a contract in place setting out the terms and conditions for the provision of services, the rights and responsibilities of each party and the extent of the liability that each party has to the other, on a case by case basis.

٢٠. عندما تتعاقد الشركات بالتعامل فيما بينها أو مع شركات أخرى، يجب أن ترتبط بعقد سار يحدد أحكام وشروط تقديم الخدمات وحقوق ومسؤوليات كل طرف ومدى مسؤولية كل طرف تجاه الطرف الآخر كل حالة على حدة.



Part 3: Market Conduct Standards

الباب الثالث: معايير سلوكيات السوق

Section A: Policy Forms and Rates

فصل أ: نماذج (وثائق) التأمين والتسعير

Policy Wording and Packaging

نص وثيقة التأمين وما تتضمنه

٢١. يجب أن يستوفي نص طلب وثيقة التأمين ونماذج الوثائق المتطلبات التالية كحد أدنى:
- أ) أن تكون مكتوبة باللغة العربية مع إمكانية توفيرها باللغة الانكليزية بناءً على طلب العميل.
- ب) أن تكون لغتها وصياغة جملها بسيطة قدر الإمكان.
- ج) أن تكون مطبوعة بشكل واضح ومقروءة وألا تكون طباعتها بأحرف صغيرة جداً.
٢٢. يجب أن يستوفي طلب وثيقة التأمين ونماذج الوثائق المطبوعة المتطلبات المنصوص عليها في المادة ٥٢ من اللائحة التنفيذية لنظام مراقبة شركات التأمين التعاوني، وأن تشمل على:
- أ) بيان إقصاء يوضح أن وثيقة التأمين هو كامل العقد المعتمد به بين الطرفين.
- ب) وصف لواجبات الشخص المؤمن له بعد تكبد أية خسارة.
- ج) وصف لإجراءات التعامل مع المطالبات والتعامل مع المنازعات والمستندات المطلوبة لكل منها.
- د) أي من المرفقات أو الملاحق أو المستندات.

Policy Amendments

تعديلات وثيقة التأمين

٢٣. لا تحل وثيقة التأمين إلا بعد طلب خطي ويتوقع مقدم من قبل المؤمن له عبر البريد أو الفاكس وبعد موافقة شركة التأمين عليه، تصدر شركة التأمين بعد ذلك ملحقاً للوثيقة إلى المؤمن له.
٢٤. أما بالنسبة للأخطاء الإملائية أو التعديلات التي تطرأ على الأنظمة، فإنه بالإمكان تغيير الوثيقة دون الحصول على طلب مقدم من المؤمن له مع



as the customer is notified in writing.

إبلاغه كتابياً بهذا التغيير.

Policy Cancellation

إلغاء وثيقة التأمين

25. Companies should include cancellation terms that are fair to customers and are reasonable and appropriate with regard to the product. The cancellation conditions must be clearly stated in the policy contract, including:

٢٥. يجب على الشركات أن تنص على شروط إلغاء الوثيقة بحيث تكون عادلة وواضحة بالنسبة للعملاء ومعقولة ومناسبة فيما يتعلق بالمنتج. ويجب أن تكون شروط إلغاء الوثيقة مبينة بشكل واضح في وثيقة التأمين، متضمنة ما يلي:

- Conditions permitting the insurance company to cancel the policy.
- Conditions permitting the policyholder to cancel the policy.
- Cancellation notice requirements, including notice period. In any case, excluding emergency cases such as war, riots, strikes, and terrorist attacks, the policyholder should be afforded a minimum period of thirty (30) days before the effective date of cancellation by the companies (as per article 54 of the Implementing Regulations).
- A description of the refund of premium due to the policyholder on cancellation of the policy and when it would be payable.
- For Protection and Savings insurance, in addition to (d) above, a description and illustration of the cash surrender value, if applicable, for each year of the plan.

- شروط السماح لشركة التأمين بإلغاء وثيقة التأمين.
- شروط السماح للمؤمن له بإلغاء وثيقة التأمين.
- متطلبات الإشعار بالإلغاء، بما في ذلك فترة الإشعار بالإلغاء. وفي أي حال من الأحوال - باستثناء الحالات الطارئة مثل الحرب وحالات الشغب والإضراب والإرهاب - يجب أن يمنح المؤمن له مهلة زمنية قدرها ثلاثين (٣٠) يوماً كحد أدنى قبل تاريخ سريان الإلغاء من قبل الشركة (وفقاً للمادة ٥٤ من اللائحة التنفيذية لنظام مراقبة شركات التأمين التعاوني).
- وصف لطريقة استرداد قسط التأمين المستحق للمؤمن له عند إلغاء وثيقة التأمين ومتى يكون مستحقاً للدفع.
- بالنسبة لتأمين الحماية والادخار، إضافة للفقرة (د) المذكورة أعلاه، يجب بيان وتوضيح قيمة الاسترداد النقدي، إذا كان ذلك سارياً، لكل سنة من الخطة أو البرنامج التأميني.

"Free Look" Clause (Protection & Savings Insurance Products)

شروط المدة المتاحة للنظر في الوثيقة (تأمين الحماية والادخار)

26. Every policy for protection and savings insurance should provide at least a twenty-one (21) day Free Look period from the date of delivery of the insurance contract for the policyholder to review the contract to assess its suitability and whether it provides the benefits described by the agent or broker. The policy will be deemed to be fully in force and this provision will be deemed to be waived by the

٢٦. يجب أن تنص كل وثيقة تأمين تغطي "تأمين الحماية والادخار" على مدة زمنية للنظر في الوثيقة قدرها ٢١ يوماً على الأقل من تاريخ تسليم وثيقة التأمين للمؤمن له لمراجعة الوثيقة وتقييم مدى ملاءمتها وما إذا كان توفر المزايا التي وصفها الوكيل أو الوسيط. وسوف تعتبر وثيقة التأمين سارية المفعول بشكل كامل وسيعتبر هذا الشرط متنازلاً عنه من قبل المؤمن له إذا لم يتم تبليغ شركة التأمين خلال الفترة المحددة بأنه سيتم



policyholder, if the policyholder does not inform the insurance company within the period that the policy will be returned. If the policyholder deems the policy unsuitable, the insurance company must be notified in writing within the Free Look period and a refund of premiums paid to the customer subject only to the following:

- Deduction of the expenses incurred by the insurance company on medical examination of the customer.
- Deduction of a proportionate risk premium for the period of cover.
- In respect of a unit linked plan, the insurance company shall also be entitled to make an appropriate adjustment to take account of changes in the unit price.

Pricing

27. Companies must apply the pricing structure submitted to and approved by SAMA as part of the product approval application.

Section B: Advertising and Promotion

Honest Representation

28. Companies must not communicate any statements or advertising, directly or indirectly, that are inaccurate, misleading, exaggerated, or deceptive, including but not limited to information on:

- Name of the company issuing the insurance policy.
- Financial status of the insurance company issuing the policy.
- Coverage of the policy.
- Benefits or advantages promised by the policy.
- If the advertising includes the policy pricing, then it should indicate whether the price is inclusive of all

إرجاع وثيقة التأمين. وإذا اعتبر العميل المؤمن له أن وثيقة التأمين غير مناسبة، فيجب إشعار شركة التأمين خطياً خلال الفترة المتاحة للنظر في الوثيقة وتخضع الأقساط التي يتم استردادها و دفعها للعميل لما يلي فقط:

- أ) خصم النفقات التي تكبدتها شركة التأمين على الفحص الطبي للعميل.
- ب) خصم يتناسب مع المخاطرة لفترة التغطية.
- ج) فيما يتعلق بالبرنامج المرتبط بوحدة ، يحق لشركة التأمين أن تقوم بتعديل مناسب للأخذ في الحسبان التغيرات في سعر الوحدة.

التسعير

27. يجب أن تطبق الشركات طريقة التسعير المقدمة للمؤسسة والتي سبق الموافقة على العمل بها كجزء من طلب الموافقة على المنتج.

فصل ب: الإعلان والتسويق

المصداقية في العرض

28. يجب على الشركات ألا تقدم أية بيانات أو إعلانات غير دقيقة أو مضللة أو مبالغ فيها أو خادعة، بشكل مباشر أو غير مباشر، على سبيل المثال لا الحصر، معلومات حول:

- أ) اسم الشركة المصدرة لوثيقة التأمين.
- ب) الوضع المالي لشركة التأمين المصدرة لوثيقة التأمين.
- ج) تغطية وثيقة التأمين.
- د) المزايا أو الفوائد التي تمنحها وثيقة التأمين.
- هـ) إذا كان الإعلان يتضمن سعر وثيقة التأمين، فيجب إيضاح ما إذا كان السعر شاملاً لكافة الرسوم أم لا.



fees.

Defamatory Statements

بيانات مضللة

29. Companies should not include in their advertising any false, defamatory, or negative statements on other companies.

٢٩. يجب ألا تشمل إعلانات الشركات على أية بيانات خاطئة أو مضللة أو سلبية عن شركات تأمين أخرى.

Section C: Pre-sale Customer Contact

فصل ج: الاتصال مع العميل خلال فترة ما قبل البيع

Information about the Companies' Offering

معلومات عن عروض منتجات الشركات

30. Companies must disclose, at a minimum, the following information to each customer prior to accepting an application for an insurance contract:

٣٠. يجب أن تفصح الشركات كحد أدنى عن المعلومات التالية لكل عميل قبل قبول طلب الحصول على وثيقة تأمين:

- Whether they are an insurance company, or are acting on behalf of an insurance company, or acting on behalf of the customer.
- Any financial relationship between a broker and the insurance company other than the normal commission agreements. In particular if there is any cross-ownership, or both parties have owners in common, the customer should be informed.
- The nature and range of products and services they can provide.

أ) ما إذا كانت هي شركة تأمين أو تعمل لمصلحة شركة تأمين أخرى أو تعمل بشكل مستقل لمصلحة العميل.

ب) إذا هناك علاقة مالية بين الوسيط وشركة التأمين غير اتفاقيات العمولة العادية. وعلى وجه الخصوص، إذا كانت هناك أية ملكية مشتركة، أو كان لدى الطرفين ملاك مشتركين، يجب أن يبلغ العميل بذلك.

ج) طبيعة ونطاق المنتجات والخدمات التي يمكن أن تقدمها.

Customer Needs Assessment

تقدير احتياجات العميل

31. Companies must seek information from customers as might reasonably be expected to assess their insurance needs in relation to the products and services in which they indicated an interest. Companies are not required to determine customers' insurance needs beyond the specific products and services in which customers have indicated an interest, except with regard to protection and savings contracts (see article 38 below).

٣١. يجب أن تسعى الشركات إلى الحصول على حد معقول من المعلومات عن العملاء لتقدير احتياجاتهم من منتجات وخدمات التأمين التي يرغبون الحصول عليها. ولا يتطلب من الشركات تحديد احتياجات العملاء من التأمين بقدر أعلى من المنتجات والخدمات التي أبدوا رغبتهم في الحصول عليها، باستثناء عقود تأمين الحماية والإنذار (انظر المادة ٣٨ أدناه).

32. Customers should be informed of their duty to disclose relevant and accurate information at every stage of the business relationship (e.g., applications, renewal, claim requests, etc.).

٣٢. يجب إبلاغ العملاء عن واجبهم بالإفصاح عن معلومات دقيقة وذات صلة عنهم في كل مراحل التعامل مع الشركة، على سبيل المثال لا الحصر عند تعبئة نموذج طلب التأمين، والتجديد وتقديم



المطالبة إلخ.

Advice to Customers

تقديم المشورة والتوصية للعملاء

33. Companies must ensure that the advice given to clients adequately meets their needs.

٣٣. يجب على الشركات التأكد من أن المشورة والتوصية المقدمة للعملاء تلبي احتياجاتهم بشكل كافٍ.

34. Companies must provide sufficient information to enable customers to make informed decisions when purchasing insurance products and services, including:

٣٤. يجب على الشركات توفير معلومات كافية عن المنتجات والخدمات لتمكين العملاء من اتخاذ قرارات واعية ومبنية على معلومات كافية عند شراء منتجات وخدمات التأمين، من ضمنها:

- a) An explanation of how the proposed advice meets their needs.
b) If different options are identified, the difference in the benefits, coverage, and costs of such options.

(أ) توضيح ملائمة المشورة المقترحة في تلبية احتياجاتهم.
(ب) إذا تم تحديد خيارات مختلفة في المشورة المقترحة، يجب إعطاء معلومات حول الاختلاف في مزايا وتغطية وتكاليف هذه الخيارات.

Avoidance of Churning

تجنب تضخم المصاريف

35. Companies should not advise a customer to replace an existing protection and savings policy with a new one, unless it fully justifies the recommendation and makes it clear that a second set of initial charges will be incurred, and the agent or broker will earn initial commissions on the new product.

٣٥. يجب ألا توصي الشركات العميل باستبدال وثيقة تأمين الحماية والادخار بأخرى جديدة، ما لم تبرر بشكل كامل التوصية وتوضح أنه سوف يتم تكبد مبالغ أخرى من المصاريف الأولية، وأن الوكيل أو الوسيط سوف يتقاضى عمولات أولية على المنتج الجديد.

Quotations to be Obtained from More than One Insurance Company

عروض الأسعار التي يتم الحصول عليها من أكثر من شركة تأمين

36. Insurance brokers must make reasonable efforts to obtain quotations from several insurance companies, and indicate the reasons for recommending any particular insurance company. For contracts other than protection and savings, if the insurance company recommended by the broker has not provided the cheapest quotation, the broker must provide details of the cheapest quotation to the customer, and a full justification for his recommendation. The justification should include a comparison of the terms and conditions, as well as the clarification of the difference in coverage and

٣٦. يجب أن يقوم وسطاء التأمين بجهود مقبولة للحصول على عروض أسعار من عدة شركات تأمين، ويوضحوا أسباب توصيتهم بأية شركة تأمين محددة. وبالنسبة لعقود التأمين العام والتأمين الصحي، إذا لم تقدم شركة التأمين التي أوصى الوسيط بها السعر الأرخص للعميل، يجب على الوسيط أن يقدم للعميل تفاصيل السعر الأرخص ويبرر ذلك كاملاً لتوصيته. ويجب أن يشمل التبرير على مقارنة للأحكام والشروط المقدمة وتوضيح الفرق في حدود التغطية والتعويض ونسبة التحمل بين شركة وأخرى والتي يبنى عليها تقدير القسط. وإذا كان الوسيط سوف يتقاضى عمولة أكبر على الوثيقة الموصى به، يجب توضيح هذا الأمر



compensation offered by each insurance company, and if the broker would earn more commission on the recommended contract this must be explained to the customer.

للعميل.

Section D: Sale of Insurance Products and Services

فصل د: بيع منتجات وخدمات التأمين

Disclosure to Customers

فصاح للعملاء

37. Prior to accepting an application for an insurance policy, the companies must provide customers, upon their request, with the key terms and conditions of the product and service to be purchased, including but not limited to:

١. قبل قبول طلب الحصول على وثيقة تأمين، يجب أن تزود الشركات العملاء بناءً على طلبهم بالأحكام والشروط الأساسية للمنتج والخدمة التي سيتم شراؤها، على سبيل المثال لا حصر:

- The name of the insurance company underwriting the policy.
- Benefits, exclusions, and deductibles.
- The coverage period.
- All related costs, including premiums and any other fees.
- The terms of payment covering the periodicity of payment, grace period, implications of discontinuing the premium and any other related details.
- The claims handling procedure.
- The complaints handling procedures.
- The obligations of each party under the insurance policy.
- The cancellation rights and conditions.
- The renewal date and contract clauses to be renegotiated (if any).
- The requirements for carrying out policy alterations.
- Any aspect of the policy where the insurance company has the right to change something once cover has commenced such as benefit charges

- اسم شركة التأمين التي تضمن تغطية وثيقة التأمين.
- المزايا والاستثناءات والاقطاعات.
- فترة التغطية.
- كافة التكاليف ذات الصلة، بما فيها أقساط التأمين وأية رسوم أخرى.
- شروط الدفع والمداد التي تشمل مواعيد دفع الأقساط، وفترة السماح، وعواقب الانقطاع عن سداد الأقساط، وأية تفاصيل أخرى متعلقة بذلك.
- إجراءات تسوية المطالبات.
- إجراءات التعامل مع الشكاوي.
- التزامات وواجبات كل طرف بموجب وثيقة التأمين.
- الحقوق والشروط المتعلقة بالإلغاء.
- تاريخ التجديد وإعادة التفاوض في بنود العقد إذا استلزم الأمر.
- متطلبات إجراء تعديلات على وثيقة التأمين.
- أي جانب من جوانب وثيقة التأمين يكون لشركة التأمين الحق في تغيير أي بند بعد بدء سريان مفعول التغطية كرسوم المزايا



- and policy fees on protection and savings business.
- m) Any unusual restriction or condition attaching to the customer.
- n) The postal address, telephone, fax and email contact details of the insurance company.
38. In addition to the above, companies must provide the following information with regard to protection and savings insurance products:
- a) Whether the plan is participating, non-participating or an investment linked plan.
- b) In case of participating, the basis of participation in profits i.e., cash bonus, deferred bonus, reversionary bonus, terminal bonus etc.
- c) Plan illustration providing the sum insured, surrender value and paid-up value over the term of the plan. The illustration should show these values at the end of each of the first five (5) policy years, five (5) yearly thereafter, and at maturity date if appropriate or up to age eighty-five (85) if not.
- d) If benefits are not fully guaranteed, the customer should be provided with three illustrations with gross investment return rates of 3%, 5% and 7% p.a.
- e) The extent of any investment or expense guarantees. It should be clearly stated that values shown are for illustrative purposes only unless the investment and expense charges are fully guaranteed.
- f) For non-linked plans, where applicable, a breakdown of the premiums and charges by main cover, supplementary cover and any
- والرسوم على وثيقة الحماية والادخار.
- م) أي قيد أو شرط غير عادي قد يكون فيه ضرر يمس العميل.
- ن) العنوان البريدي والهاتف والفاكس والبريد الإلكتروني لشركة التأمين.
38. إضافة إلى ما ورد أعلاه، يجب على الشركات تقديم المعلومات التالية فيما يتعلق بمنتجات تأمين الحماية والادخار:
- أ) توضيح ما إذا كان برنامج الحماية والادخار هو برنامج يقوم على المشاركة أو عدم المشاركة في الأرباح، أو برنامج استثماري مرتبط بوحدة.
- ب) في حالة المشاركة في الأرباح، توضيح ما هو أساس المشاركة في الأرباح، سواء كان علاوة نقدية أو علاوة مؤجلة أو علاوة مضافة إلى ما بعد الوفاة (علاوة عينية) أو علاوة نهاية العقد، إلى آخره.
- ج) توضيح للبرنامج حيث يبين المبلغ المؤمن عليه وقيمة الاسترداد والمبلغ المدفوع خلال فترة البرنامج. وأيضاً يجب أن يبين هذا التوضيح المبالغ في نهاية كل سنة من السنوات الخمس (5) الأولى من مدة وثيقة التأمين، ومن ثم كل خمس (5) سنوات، وعند تاريخ الاستحقاق إذا كان ذلك مناسباً أو حتى سن الخامسة و الثمانين (85) سنة إذا لم يكن ذلك مناسباً.
- د) إذا لم تكن المزايا والفوائد مضمونة بشكل كامل، يجب أن يزود العميل بثلاثة إيضاحات لإجمالي معدلات العائد على الاستثمار وهي 3% و 5% و 7% لكل سنة.
- هـ) مدى ضمان أي استثمار أو مصروفات محملة، حيث يجب أن يبين للعميل بشكل واضح أن القيم الموضحة هي فقط لغرض التوضيح إلا إذا تم ضمان الاستثمار والمصروفات المحملة بشكل كامل.
- و) بالنسبة للبرامج غير المرتبطة بوحدة، في حالة تطبيقها، يجب توزيع أقساط التأمين والرسوم حسب التغطية الرئيسية، والتغطية المكملة وأية تغطية أو خدمات

other cover or services provided.

- g) When presenting information related to past performance, the basis on which the performance was calculated together with a statement that past performance is not indicative of future performance.

- h) If the policyholders' funds may be invested in a range of linked investment funds, a description of the investment funds, which should include, at a minimum:

1. A description of the asset classes the fund may invest in.
2. A risk or volatility rating for each fund.
3. If the fund is measured against a benchmark, details of that benchmark.
4. Geographical spread of the investments.
5. A statement of any concentration of investments into particular types of investments.
6. The currency that the fund is priced in.
7. The frequency that the fund is priced.
8. The name of the fund manager, if the fund is external to the insurance company.
9. Past performance of the fund, subject to the same comments as stated in (g) above.

أخرى مقدمة.

ز) عند تقديم معلومات للعميل متعلقة بالأداء الماضي، الأساس الذي تم بناءً عليه حساب الأداء، فإنه يجب التوضيح للعميل أن الأداء الماضي ليس دالاً على الأداء المستقبلي ولا يضمن بالضرورة تحقيق العوائد المستقبلية.

ح) إذا كان يمكن استثمار أموال أصحاب وثائق التأمين في مجموعة من صناديق الاستثمار المرتبطة بوحدة، فيجب وصف صناديق الاستثمار على أن يشتمل وصفها كحد أدنى على:

١. وصف لفئات الأصول التي يمكن أن يستثمر فيها الصندوق.
٢. تصنيف لكل صندوق من حيث المخاطر والتقلب في الأسعار.
٣. يجب توضيح المعيار إذا كان الصندوق يقاس بناءً على معيار ما.
٤. الانتشار الجغرافي للاستثمارات.
٥. بيان أي تركيز للاستثمارات في أنواع معينة من الأوعية الاستثمارية.
٦. العملة التي يسعر بها الصندوق.
٧. عدد مرات تسعير الصندوق.
٨. اسم مدير الصندوق، إذا كان الصندوق من خارج شركة التأمين.
٩. الأداء الماضي للصندوق مع مراعاة ما هو مذكور في الفقرة (ز) أعلاه.

39. Companies selling protection and savings contracts should complete a client fact find containing sufficient information to fully back-up the product recommendation made. The fact find must be signed by the client, and retained on the clients file. In the event of any dispute over the appropriateness of the contract sold, the contents of the fact find will be taken fully into account. If the fact find is not on the file, or is poorly or partially completed, this is likely to lead to the dispute being

٣٩. يجب على الشركات التي تقوم ببيع وثائق تأمين الحماية والادخار أن تستكمل نموذج تقصي حقائق العميل الذي يحتوي على معلومات كافية لدعم المنتج الموصى به بشكل كامل، ويجب أن يوقع نموذج تقصي الحقائق من قبل العميل ويحتفظ به في ملف العملاء. وفي حال أي خلاف حول ملائمة الوثيقة المباعة، سوف يتم أخذ محتويات نموذج تقصي الحقائق بشكل كامل في الحسبان. وإذا لم يكن نموذج تقصي الحقائق في الملف أو تمت تعبئته على نحو ضعيف أو بصورة غير كاملة، فمن المحتمل أن يؤدي ذلك إلى تسوية



- resolved in favor of the client. الخلاف لمصلحة العميل.
40. Insurance service providers arranging the insurance contact must disclose to the customer at the point of sale the full commissions and/or fees earned for the services provided from all sources. ٤٠. يجب على شركات المهن الحرة التي ترتب عقد التأمين الإفصاح للعميل عند البيع عن كافة العمولات و/ أو الرسوم التي يتم تقاضيها مقابل الخدمات المقدمة لذلك العميل من كافة المصادر.
41. Insurance cover may not be back-dated on any compulsory insurance product. ٤١. لا يمكن أن تؤرخ تغطية التأمين الإلزامي بتاريخ سابق على أي منتج تأميني.
- No insurance company, or employee of an insurance company may provide evidence of cover on a product unless the customer has committed to taking out a full annual policy that complies with the minimum standards set for that policy. ولا يمكن لشركة تأمين أو موظف شركة تأمين تقديم دليل على تغطية المنتج ما لم يكن العميل قد تعهد بالحصول على وثيقة تأمين سنوية كاملة تلتزم بالمعايير الدنيا المحددة لتلك الوثيقة.

Customer Obligations

التزامات العميل

42. Prior to entering into an insurance contract, the companies must inform customers of their key obligations under the insurance contract to pay premiums in a timely manner and to provide full and honest disclosure of all relevant information needed to determine the insurance needs and underwrite the risk. The customer should only be expected to advise the companies of information that a reasonable person would regard to be relevant. ٤٢. قبل إبرام وثيقة التأمين، يجب على الشركات إبلاغ العملاء بالتزاماتهم الرئيسية بموجب وثيقة التأمين لدفع الأقساط في وقتها وتوفير إفصاح كامل وعادل عن كافة المعلومات ذات الصلة والضرورية لتحديد احتياجات التأمين وتغطية المخاطر. ولا يتوقع من العميل أن يفصح للشركة سوى عن المعلومات التي تعتبر معلومات ذات صلة بنظر الشخص العادي.

Confirmation of Coverage

تأكيد التغطية

43. Upon entering into an insurance contract, companies must promptly provide customers with official written confirmation of the insurance coverage. In case the full documentation is not available, the companies must issue temporary evidence of coverage confirmation, which can be legally used as a proof of coverage. ٤٣. عند إبرام وثيقة التأمين، يجب فوراً على الشركات أن تزود العملاء بتأكيد خطي رسمي على تغطية التأمين. وفي حال عدم توفر كامل الوثائق، يجب أن تصدر الشركة شهادة مؤقتة على تأكيد التغطية، يمكن أن تستخدم نظامياً كدليل على التغطية.
44. When an application for a compulsory insurance product such as motor or health is taken with a premium payment, a receipt should be provided to the customer indicating that coverage commences at an ٤٤. عند استلام طلب الحصول على منتج تأمين إلزامي - كالتأمين على المركبة أو التأمين صحي - مع دفعة للقسط الأول مقدماً، يجب تقديم وصل للعميل يبين أن التغطية تبدأ بالتاريخ المتفق عليه سواء كان بتاريخ استكمال تقديم الطلب أو بتاريخ



agreed upon date on or after the application date.

لاحق.

45. When an application for insurance is taken without a premium payment, a receipt should be provided to the customer indicating that coverage will commence at the date stated in the policy provided the first premium has been paid by that date. If the premium is not paid by the commencement date stated in the policy, then the company must have received a written and binding commitment from either the applicant or the agent or broker to pay the premium, in order for the company to initiate cover.

٤٥. عند استلام طلب الحصول على تأمين بدون دفع قسط تأمين مقدماً، يجب أن يقدم إيصال استلام للعميل يبين أن التغطية سوف تبدأ بالتاريخ الموضح في وثيقة التأمين مع دفع القسط الأول. وفي حالة عدم دفع القسط في التاريخ الموضح في الوثيقة، عند إذن يجب على طالب وثيقة التأمين أو وكيل التأمين أو وسيط التأمين أن يقدم التزام كتابياً لشركة التأمين بدفع القسط لبدء تغطية الوثيقة.

Documentation

مستندات الوثائق

46. Companies must promptly provide the full policy documentation to customers after entering into an insurance contract.

٤٦. يجب على الشركات تقديم كامل مستندات وثائق التأمين للعملاء فوراً بعد إبرام تلك الوثائق.

Related Parties

الأطراف ذات الصلة

47. No insurance policy shall be issued or renewed by an insurance company to any of its owners or members of the Board of Directors, Senior and Executive Managers, and their related parties except after the payment of the full premium (as per article 49 of the Implementing Regulations). Related parties shall be taken to mean close family members, wives, husbands, children, parents, brothers, sisters, and any establishment in which any member of the Board of Directors has more than 5% interest.

٤٧. يجب ألا تقوم شركة التأمين بإصدار أو تجديد وثيقة تأمين لأي من ملاكها أو أعضاء مجلس إدارتها أو كبار مدراءها التنفيذيين أو الأطراف ذوي الصلة بهم إلا بعد دفع كامل القسط (وفقاً للمادة ٤٩ من اللائحة التنفيذية لنظام مراقبة شركات التأمين التعاوني). ويقصد بالأطراف ذوي الصلة أفراد العائلة من الزوجات والأزواج والأطفال والآباء والأمهات والأخوان والأخوات، وأي من المؤسسات التي يملك فيها أي عضو من أعضاء مجلس الإدارة أكثر من ٥%.

Premium Collection

تحصيل الأقساط

48. Companies must not collect premiums or fees for transactions that are not in the process of being provided or have not yet been provided.

٤٨. يجب ألا تقوم الشركات بتحويل الأقساط أو الرسوم على الخدمات التي لا تقدمها الشركة أو على الخدمات المستقبلية التي لم تقدم بعد.

49. Insurance companies are considered to have received the premiums once the premiums are received by the agents.

٤٩. تعتبر شركات التأمين قد استلمت مبالغ أقساط التأمين فور استلام الوكيل للأقساط من العملاء.



Section E: Post-sale Customer Servicing

فصل هـ: خدمة العميل بعد البيع

After-Sale Service

خدمة ما بعد البيع

50. Companies must provide after sales services to customers in a timely and appropriate manner, including responding to their inquiries, administrative requests, and requests for amending the insurance policies. In particular, companies must:

٥٠. يجب أن تقوم الشركات بعد البيع بتقديم خدمات للعملاء في وقتها وبطريقة مناسبة، بما في ذلك الرد على استعلاماتهم وطلباتهم الإدارية وطلباتهم بتعديل وثائق التأمين. وبشكل خاص يجب على الشركات إتباع التالي:

- Provide certificates of coverage when requested by the customer.
- Provide written confirmation of any amendments to the policy and any additional amounts due.
- Issue receipts for any amounts received, unless payment is made by credit card or other form of automated bank transfer when the bank records will suffice.
- Issue refunds or other charges due to customers.

- تقديم شهادات التغطية عندما تطلب من قبل العميل.
- تقديم تأكيد خطي لأية تعديلات على وثيقة التأمين و لأية مبالغ إضافية مستحقة.
- إصدار إيصال استلام لأية مبالغ تم استلامها، ما لم يتم الدفع عن طريق البطاقة الائتمانية أو صورة أخرى من التحويل المصرفي الآلي عندما تكفي سجلات المصرف بالغرض.
- دفع المبالغ واجبة الاسترداد أو أي رسوم أخرى مستحقة للعميل.

51. Companies must promptly notify customers of any changes in the disclosures or conditions made to the customers at the time of entering into the insurance contract. This includes changes in the companies' contact details and changes in the claims filing procedure.

٥١. يجب على الشركات إشعار العملاء فوراً بأي تغييرات في الإفصاح أو الشروط المعدة للعملاء عند إبرام وثيقة التأمين. ويشتمل هذا على التغييرات في بيانات الاتصال بالشركة والتغييرات في إجراءات تقديم المطالبات.

Claims Handling

تسوية المطالبات

52. For companies whose licensed activities includes claims handling, they must:

٥٢. يجب على الشركات فيما يتعلق بتسوية المطالبات إتباع التالي:

- Respond to claims filing in a prompt manner.
- Provide claims forms showing all the information or steps required by the customer (including the beneficiary under a protection and savings policy) to file the claim.
- Acknowledge to the insured customer the receipt of the claim and any missing information and documents within seven (7) calendar

- الرد على المطالبات المستلمة بشكل سريع.
- تقديم نماذج المطالبات التي تبين كافة المعلومات أو الإجراءات المطلوبة من العميل (بما في ذلك المستفيد بالنسبة لوثيقة تأمين الحماية والادخار) لتقديم المطالبة.
- الإقرار للمؤمن له بتلقي المطالبة وإشعار العميل بأية معلومات ومستندات ناقصة خلال سبعة (٧) أيام من تلقي نموذج



days from receiving the claim's application form.	المطالبة.
d) Provide adequate guidance to the insured customer in filing the claim and information on the claims handling process.	د) تقديم إرشادات توجيهية للمؤمن له عند تقديم المطالبة وتزويده بمعلومات كافية عن الإجراءات لإتمام عملية تسوية المطالبات.
e) Inform insured customers of the progress of filed claims, at least every fifteen (15) working days (as per article 44 of the Implementing Regulations).	هـ) تبليغ المؤمن له بالتقدم الحاصل في المطالبات المستلمة، على الأقل كل خمسة عشر (١٥) يوماً (وفقاً للمادة ٤٤ من اللائحة التنفيذية لنظام مراقبة شركات التأمين التعاوني).
f) Handle claims in a fair manner.	و) تسوية المطالبات بكل نزاهة وعدالة ودون تمييز.
g) Appoint a claims or loss adjuster when necessary, and notify the customer of such an appointment within three (3) working days.	ز) تعيين خبير معاينة أو مقدر الخسائر إذا كان ذلك ضرورياً، وإشعار العميل بهذا التعيين خلال ثلاث (٣) أيام عمل.
h) Conduct a reasonable investigation of claims within a time period not exceeding ten (10) days for individual policyholders and thirty (30) days for commercial entities.	ح) إجراء تحقيق مقبول في المطالبات خلال مدة زمنية لا تتجاوز عشرة (١٠) أيام للأفراد وثلاثين (٣٠) يوماً للشركات.
i) Notify the customer in writing of the claim acceptance or refusal promptly after completing the investigation, stating the following:	ط) إشعار العميل كتابياً بقبول أو رفض المطالبة فوراً بعد استكمال البحث مع ذكر التالي:
1. For accepted claims (full or partial acceptance):	١. بالنسبة للمطالبات المقبولة (قبول كامل أو جزئي):
- Settlement amount.	- مبلغ التسوية.
- How the settlement amount was reached.	- توضيح كيف تم التوصل إلى مبلغ التسوية.
- Justification if reduced settlement is offered or any part of the claim is not accepted.	- التبرير فيما إذا تم تخفيض مبلغ التسوية أو في حال عدم قبول جزء من المطالبة.
2. For denied claims:	٢. بالنسبة للمطالبات المرفوضة:
- Written reason for denying the claim under question.	- تقديم سبب خطي لرفض الطلب المقدم.
- Copies of documents or information that were used in reaching the decision, if requested.	- تقديم نسخ للوثائق أو المعلومات المستخدمة في التوصل للقرار، إذا طلب ذلك.
j) Explain the appeal or complaints process, if the settlement is not	ي) شرح إجراءات تقديم الشكاوى، إذا لم تقبل



accepted by the customer.

- k) For accepted claims, forward the claims settlement payment without undue delay upon receiving all required information and documentation (as per article 44 of the Implementing Regulations).

التسوية من قبل العميل.

ك) في حالة صحة المطالبة، يتم دفع مبالغ المطالبات بدون تأخير غير مبرر عند تلقي كافة المعلومات والوثائق المطلوبة وفقاً للمادة ٤٤ من اللائحة التنفيذية لنظام مراقبة شركات التأمين التعاوني).

Claims Settlement

فترة تسوية المطالبات

53. Insurance companies must settle claims within the time period indicated in article 44 of the Implementing Regulations, and when that is not possible, provide an explanation, with reason(s) for such delay.

٥٣. يجب على شركات التأمين تسوية المطالبات خلال الفترة المبينة في المادة ٤٤ من اللائحة التنفيذية لنظام مراقبة شركات التأمين التعاوني، وعند تكرر ذلك تقدم شرحاً مع بيان أسباب هذا التأخير.

Credit Control

مراقبة الائتمان

54. Companies may not provide excessive credit to customers. Full payment terms must be agreed in writing at the outset of the policy, and the insurance company is allowed to cancel a policy promptly if payments are not made on time. In all cases, the company should promptly cancel a policy, after appropriate warnings, and thirty (30) days notice, if payments are not made. Premiums must be paid separately from, and may not be offset from, claims payments.

٥٤. يجب ألا تقدم الشركات ائتمناً مفرطاً للعملاء. ويجب الاتفاق على آلية دفع الأقساط بشكل واضح عند توقيع وثيقة التأمين، ويجب أن يتم النص في الوثيقة على تلك الآلية، ويحق لشركة التأمين إلغاء وثيقة التأمين فوراً إذا لم يتم سداد الأقساط في وقتها. وفي جميع الأحوال، يجب على شركة التأمين إلغاء الوثيقة بعد إنذار العميل وإعطائه مهلة ثلاثين (٣٠) يوماً. ويجب دفع أقساط التأمين بشكل مستقل عن المدفوعات الناتجة من تسوية المطالبات ولا يمكن أن تكون عوضاً عنها.

Complaints Handling

التعامل مع الشكاوي

55. Companies must put in place a fair, transparent, and accessible complaints handling process and controls, and inform customers of the complaints filing procedures.

٥٥. يجب على شركات التأمين إعداد إجراءات المراقبة الداخلية وآلية عادلة وشفافة للتعامل مع الشكاوي، وإبلاغ العملاء بإجراءات تقديم الشكاوي.

56. Upon receiving a complaint, companies must carry out the following:

٥٦. عند تلقي شكوى، يجب أن تقوم الشركات بالتالي:

- a) Acknowledge the receipt of the complaint.
b) Provide an estimate of the time to address the complaint.
c) Provide the customer with the contact reference to follow up on the filed complaint.

أ) الإقرار بتلقي الشكوى.

ب) تقديم تقدير زمني للتعامل مع الشكوى.

ج) تزويد العميل بمرجع الاتصال لمتابعة الشكوى المقدمة.



d) Inform customers on the progress of the filed complaint.	د) تبليغ العملاء بالتقدم الحاصل في الشكوى المقدمة.
e) Address the complaints in a prompt and fair manner within ten (10) working days of receiving the complaint.	هـ) تسوية الشكاوي بطريقة سريعة وعادلة خلال (١٠) أيام عمل من تلقي الشكوى.
f) Notify the customer, in writing, whether the complaint or the claim is accepted or rejected, and the underlying reasons for the decision and, if applicable, any offered compensation.	و) إشعار العميل، خطياً، ما إذا كانت الشكوى أو المطالبة مقبولة أو مرفوضة، والأسباب الداعية لذلك وأي تعويض معروض على العميل.
g) Explain the dispute filing process to escalate the complaint or the claim to the committees established by article 20 of the law on supervision of cooperative insurance companies.	ز) شرح آلية رفع وتقديم الشكوى أو المطالبة إلى اللجان المشكلة بموجب المادة (٢٠) من نظام مراقبة شركات التأمين التعاوني.

Cancellation

الإلغاء

57. Cancellation of policies must conform to the cancellation conditions specified in the policy terms and conditions referred to in article 25. Cancellations by the insurance company must be notified to customers in writing, including a reference to the relevant contractual cancellation condition and explanation of the underlying reasons for the cancellation.	٥٧. يجب أن يتوافق إلغاء وثائق التأمين مع شروط الإلغاء المحددة في شروط وأحكام وثيقة التأمين (انظر المادة ٢٥ من هذه اللائحة). ويجب تبليغ العملاء خطياً عند إلغاء الوثيقة، بما في ذلك الإشارة إلى بند إلغاء الوثيقة ذي الصلة والذي تم النص عليه فيها وشرح الأسباب الداعية لإلغاء تلك الوثيقة.
58. Amounts due to customers as a result of the cancellation of a policy must be paid without undue delay, and must be calculated in accordance with the provisions of article 54 of the Implementing Regulations.	٥٨. يجب دفع المبالغ المستحقة للعملاء نتيجة لإلغاء وثيقة التأمين بدون تأخير غير مبرر، ويجب حساب هذه المبالغ وفقاً لأحكام المادة ٥٤ من اللائحة التنفيذية لنظام مراقبة شركات التأمين التعاوني.

Renewal and Expiry

التجديد والانتهاؤ

59. Companies must inform customers of the policy renewal or expiry date in a timely manner to allow customers to arrange continuing insurance coverage.	٥٩. يجب على الشركات إشعار العميل بتاريخ تجديد أو انتهاء وثيقة التأمين قبل وقت كافٍ ليتمكن العميل من التجديد أو الحصول على تغطية من شركة أخرى.
60. For all protection and savings contracts, insurance companies should provide an annual statement to their customers which includes the following information:	٦٠. بالنسبة لكافة وثائق تأمين الحماية والادخار، يجب أن تقدم شركات التأمين بياناً سنوياً للعملاء يتضمن المعلومات التالية:



a) Projected maturity value, or policy value at the age of eighty-five (85).	أ) القيمة المستحقة المقدرة، أو قيمة وثيقة التأمين في عمر الخامسة و الثمانين (٨٥).
b) Current sum insured on main and supplementary benefits.	ب) المبلغ الحالي المؤمن على المزايا الأساسية والمكملة.
c) Total premiums paid in the previous year.	ج) إجمالي الأقساط المدفوعة في العام السابق.
d) Policies linked to investment funds should show the value of the units in each fund.	د) يجب أن تبين وثائق التأمين المرتبطة بصناديق الاستثمار قيمة الوحدات في كل صندوق.

Distribution of Surplus

توزيع الفائض

٦١. يجب على شركة التأمين أن تحدد الآلية التي سوف تتبعها في الوثيقة امتثالاً للمادة ٧٠ من اللائحة التنفيذية لنظام مراقبة شركات التأمين التعاوني، وأن تقدم هذه الوثيقة للمؤسسة للموافقة عليها. ويجب أن تكون هذه الوثيقة متوفرة للعملاء وعموم الناس.
61. An insurance company must document the mechanism it will put in place to comply with article 70 of the Implementing Regulations, and submit this document to SAMA for approval. This document should then be freely available to customers and members of the public.

Anti Fraud Regulation 2008



Insurance Supervision Department

إدارة مراقبة التأمين

ANTI FRAUD REGULATION

لائحة مكافحة الاحتيال

Version 2.0 (December 2008)



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Saudi Arabian Monetary Agency ("SAMA")
Anti Fraud Regulation ("This Code")

مؤسسة النقد العربي السعودي (المؤسسة)
لائحة مكافحة الاحتيال (اللائحة)

Part 1: Introduction

الباب الأول: مقدمة

Purpose

الغرض

1. This Code presents the general principles and minimum standards that should be met by insurance and reinsurance companies, including branches of foreign insurance and reinsurance companies, and insurance related service providers to prevent or at least minimize the occurrence of fraud.
2. The objective of This Code is to promote high standards of fraud detection and prevention.
3. This Code must be read in conjunction with the Law on Supervision of Cooperative Insurance Companies and its Implementing Regulations, in particular articles 2, 10, 12, 15, 19, 25, 28, 31, 43, 56, 71, 76 and 77.

١. تشمل هذه اللائحة على المبادئ العامة والحد الأدنى من المعايير التي يجب أن تلتزم بها شركات التأمين وإعادة التأمين، بما فيها فروع شركات التأمين وإعادة التأمين الأجنبية، وشركات المهن الحرة، بهدف منع أو على الأقل الحد من ممارسات الاحتيال.

٢. الهدف من هذه اللائحة هو ترسيخ معايير عالية للكشف عن الاحتيال ومنعه.

٣. يجب أن تقرأ هذه اللائحة مع نظام مراقبة شركات التأمين التعاوني ولائحته التنفيذية وعلى الأخص المواد ٢، ١٠، ١٢، ١٥، ١٩، ٢٥، ٢٨، ٣١، ٤٣، ٥٦، ٧١، ٧٦ و٧٧.

Definitions

تعريفات

4. The term "Companies" in This Code is intended to include: insurance and reinsurance companies, and insurance related service providers including insurance brokerages, insurance agencies, reinsurance brokerages, and reinsurance agencies. The rest of the terms used in This Code shall have the same meaning as per article one (1) of the Implementing Regulations.

٤. يقصد بعبارة "الشركات" الواردة في هذه اللائحة شركات التأمين وإعادة التأمين وشركات المهن الحرة بما فيها وسطاء التأمين، وكلاء التأمين، وسطاء إعادة التأمين، ووكلاء إعادة التأمين. أما باقي العبارات المستخدمة في هذه اللائحة فتحمل نفس المعاني الواردة في المادة الأولى من اللائحة التنفيذية لنظام مراقبة شركات التأمين التعاوني.



٥. الاحتيال^١ في شركات التأمين هو القيام بعمل أو الامتناع عن القيام بعمل يرمي إلى كسب ميزة غير نزيهة أو غير مشروعة لصالح الطرف الذي يرتكب جريمة الاحتيال أو لصالح أطراف أخرى. ويمكن لهذه الواقعة أن تحصل على سبيل المثال عن طريق:
- أ) إساءة التصرف بالأصول
- ب) تعمد تحريف، إخفاء، قمع أو عدم الكشف عن سابق تصور وتصميم عن إحدى الوقائع المادية أو أكثر المتعلقة بقرار مالي أو عملية أو تصور لوضع شركة التأمين.
- ج) استغلال السلطة، موقع ثقة أو علاقة ائتمانية.
٥. Insurance fraud is defined¹ as an act or omission of an act intended to gain dishonest or unlawful advantage for the party committing the fraud or for other parties. This may, for example, be achieved by means of:
- a) Misappropriating assets.
- b) Deliberately misrepresenting, concealing, suppressing or not disclosing one or more material facts relevant to a financial decision, transaction or perception of the insurer's status.
- c) Abusing authority, a position of trust or a fiduciary relationship.

Scope and Exemptions

النطاق والاستثناءات

٦. تطبيق أحكام هذه اللائحة على شركات التأمين وإعادة التأمين وشركات المهن الحرة بما فيها وسطاء التأمين، وكلاء التأمين، ووسطاء إعادة التأمين، ووكلاء إعادة التأمين.
٧. يمكن أن تقع الشركات ضحية أشكال متعددة من الاحتيال من داخل الشركة أو خارجها. إلا أن غالبية هذه النشاطات تندرج في إطار ثلاث فئات كبرى:
- أ) الاحتيال الداخلي: وهو الاحتيال الذي يرتكبه موظف في الشركة.
- ب) الاحتيال الممارس من قبل شركات المهن الحرة: وهو الاحتيال الذي يرتكبه وكلاء ووسطاء التأمين ضد الشركات أو المؤمن لهم.
- ج) الاحتيال الممارس من قبل المؤمن لهم: وهو الاحتيال الذي يتم ارتكابه في شراء أو تنفيذ منتج من منتجات التأمين للحصول على تخيلية أو دفعة غير مشروعة.
٦. This Code applies to insurance and reinsurance companies, and insurance related service providers including insurance brokerages, insurance agencies, reinsurance brokerages, and reinsurance agencies.
7. Companies can be subjected to multiple forms of fraudulent activities from inside or outside the company. However, most of these activities fall under three overarching categories:
- a) Internal fraud: fraud perpetrated by a company's employee.
- b) Intermediary fraud: fraud by insurance service providers against the companies or policyholders.
- c) Policyholder fraud: fraud committed in the purchase or execution of an insurance product to obtain an illegitimate coverage or payment.

¹ Source: LAIS guidance paper on preventing, detecting and remedying fraud in insurance, October 2006

^١ المصدر: الورقة الإرشادية للرابطة الدولية للتأمين حول منع الاحتيال في شركات التأمين والكشف عنه ومعالجته، أكتوبر ٢٠٠٦



Compliance Measures

إجراءات الالتزام

8. Companies must establish appropriate internal controls and procedures to monitor and ensure compliance with This Code, including the compliance of all contracted parties, in particular when there is clear evidence of a breach in the regulation.
9. Companies must maintain adequate records to demonstrate compliance with This Code, including but not limited to, fraud detection, measure, mitigation and monitoring procedures.

٨. يجب على الشركات أن تضع إجراءات المراقبة الداخلية المناسبة لضمان متابعة الالتزام بهذه اللائحة. وفي حالة تعاقدها مع أطراف أخرى، فيتعين عليها التأكد من التزام كافة الأطراف بهذه اللائحة وبالأخص عند وجود مخالفة واضحة من أحد الأطراف المتعاقدة معها.

٩. يجب أن تحتفظ الشركات بسجلات ملائمة لإثبات التزامها بهذه اللائحة، على سبيل المثال لا الحصر الكشف عن عمليات الاحتيال وقياسها وإنفاذ إجراءات الحد منها ومراقبتها.

Non-Compliance

عدم الالتزام

10. Non-compliance with the requirements set forth in This Code will be deemed a breach of the Law on Supervision of Cooperative Insurance Companies and its Implementing Regulations and the licensing conditions and may subject the company to enforcement action.

١٠. يعتبر عدم الالتزام بالمتطلبات المنصوص عليها في هذه اللائحة مخالفا لنظام مراقبة شركات التأمين التعاوني ولائحته التنفيذية ولشروط التصريح ويمكن أن يُعرض الشركة للعقوبات النظامية.

Structure of This Code

هيكل هذه اللائحة

11. The Anti Fraud requirements are outlined in Parts 2 and 3 of This Code:
 - a) Part 2 - General Requirements, which are principle-based
 - b) Part 3 - Anti Fraud Standards, which stipulate the anti fraud requirements companies must adhere to in order to combat:
 - i. Internal fraud.
 - ii. Insurance service provider fraud.
 - iii. Policyholder fraud.

١١. متطلبات لائحة مكافحة الاحتيال مبينة في البابين الثاني والثالث من هذه اللائحة:

أ) الباب الثاني - المتطلبات العامة: تستند على مبادئ عامة.

ب) الباب الثالث - معايير مكافحة الاحتيال التي تنص على متطلبات مكافحة الاحتيال التي يتوجب على الشركات الالتزام بها بغية محاربة:

i. الاحتيال الداخلي.

ii. الاحتيال الممارس من قبل شركات المهن الحرة.

iii. الاحتيال الممارس من قبل المؤمن لهم.

Part 2: General Requirements

الباب الثاني: متطلبات عامة

Strategy

الاستراتيجية

12. Companies should have a well defined

١٢. يجب على الشركات اعتماد استراتيجية واضحة

Detection

الكشف

45. Policyholder fraud is committed by policyholders and/or third parties mainly at the policy setup and claims management stages of the client relationship.

٤٥. يرتكب المؤمن لهم و/أو أطراف تالفة هذا النوع من الاحتيال في مرحلة إنشاء الوثيقة ومرحلة إدارة المطالبات بشكل رئيسي من العلاقة مع



Consequently, companies should design and implement procedures to combat the main types of policyholder fraud, which include but are not limited to:

- a) At the policy setup stage: withholding or providing incorrect personal or background information.
- b) At the claims filing stage:
 - i. Submitting claims for fictitious damage or loss.
 - ii. Misrepresenting facts to include the claim in the coverage.
 - iii. Overstating cost of damage.

Typical policyholder fraud indicators are provided in Table III.

العميل. بالتالي، يجب على الشركات بلورة إجراءات تهدف إلى مكافحة الأنواع الأساسية للاحتيال الممارس من قبل المؤمن لهم وإدخالها في حيز التنفيذ، وتشمل هذه الأنواع من الاحتيال على سبيل المثال لا الحصر:

- أ) في مرحلة إنشاء وثيقة التأمين: التكمُّم على المعلومات الصحيحة أو تقديم معلومات شخصية أو مرجعية خاطئة.
- ب) في مرحلة رفع المطالبات:
 - i. تقديم مطالبة أو خسارة مزعومة.
 - ii. سوء تمثيل الوقائع لإدخال المطالبة في التغطية.
 - iii. الإفراط في تقدير كلفة الضرر.

يحتوي الجدول الثالث المرفق على المؤشرات النموذجية للاحتيال الممارس من قبل المؤمن لهم.

Measurement

القياس

46. Companies should maintain detailed records of occurrence of policyholder fraud. These records should detail at a minimum:

- a) The type of fraud.
- b) The technique and/or technology used to commit the fraud.
- c) The weaknesses in internal control procedures and deficiencies in processes.
- d) The fraudsters' profiles and backgrounds.
- e) The amount of the fraud.

These records are to be communicated to SAMA upon request.

٤٦. يجب أن تحتفظ الشركات بسجلات مفصلة عن وقوع الاحتيال الممارس من قبل المؤمن لهم. ويجب أن تذكر السجلات على الأقل تفاصيل عن:

- أ) نوع الاحتيال.
- ب) التقنية و/أو التكنولوجيا المستخدمة لارتكاب الاحتيال.
- ج) الضعف في الرقابة الداخلية وإجراءاتها.
- د) ملف عن مرتكبي الاحتيال وخلفيتهم السابقة.
- هـ) مبلغ الاحتيال.

يجب إحالة هذه السجلات إلى المؤسسة عند الطلب.

47. Internal auditors (or fraud function officer if existent) should prepare and submit to the board of directors on a yearly basis, comprehensive reports detailing fraud occurrence, description, trends, and an assessment of the efficiency of anti-

٤٧. يجب على المراجعين الداخليين (أو مسؤول مكافحة الاحتيال إذا وجد) تحضير تقارير مفصلة عن وقوع الاحتيال ووصف نوعه والتوجهات ذات الصلة وإحالتها إلى مجلس الإدارة سنوياً، كما ويجب تضمين التقرير تقييم لكفاءة تدابير



policyholder fraud measures.

مكافحة الاحتيال الممارس من قبل المؤمن لهم.

Mitigation

الحد من الاحتيال

48. Companies should design their policies to minimize the occurrence of fraud. Based on internal auditors' yearly reports and under the supervision of the board of directors, senior managers should implement new anti-fraud measures, procedures and policies and improve existing ones.
48. يجب أن تقوم الشركات بتصميم وثائق التأمين لديها بما يقلل من إمكانية حدوث الاحتيال. واستناداً إلى التقارير السنوية المنبثقة من المراجعين الداخليين وتحت إشراف مجلس الإدارة، يجب على مدراء الإدارة العليا تطبيق تدابير وسياسات وإجراءات جديدة لمكافحة الاحتيال، وتحسين القائم منها.
49. Companies should clearly define and document client filtering policies and set, for each insurance business class and product, the conditions required to accept new clients. These conditions should be subject to the board of directors' approval, and reviewed on an annual basis.
49. يجب على الشركات تحديد سياسات اختيار العملاء وتوثيقها بكل وضوح، ووضع الشروط الضرورية للقبول بالتأمين على عملاء جدد، وذلك لكل فئة ومنتج تأمين. وتخضع هذه الشروط لموافقة مجلس الإدارة وتتم مراجعتها سنوياً.
50. Companies should define for each insurance product clear and comprehensive claims assessment procedures, detailing in particular the steps to verify the claim's facts and validity and to check for fraud indicators (see Table III).
50. لكل منتج تأمين، يجب على الشركات تحديد إجراءات واضحة وشاملة لتقييم المطالبات حيث يتم خصوصاً تفصيل الخطوات الضرورية للتحقق من وقائع المطالبة وصدقيتها والتحقق من مؤشرات ممارسة الاحتيال (راجع الجدول الثالث).
51. Companies should inform policyholders about their anti-fraud policies and the consequences of providing false or inaccurate information. Furthermore, an information section can be included in the text of the policy itself to ensure policyholders read and agree to the measures in place.
51. يجب على الشركات إبلاغ المؤمن لهم بسياسات الشركة لمكافحة الاحتيال وبنائج تقديم معلومات مغلوطة أو غير دقيقة. إضافة إلى ذلك، يمكن إدخال فقرة المعلومات في نص الوثيقة نفسها للحرص على أن المؤمن لهم يقرؤون التدابير المنبثقة الإجراء ويوافقون عليها.
52. Since insurance business development and customer relationship requirements can conflict with fraud minimizing requirements, companies should determine the right balance between development targets, customer satisfaction, and fraud detection. Consequently, operational and fraud reduction targets should be combined and approved by the board of directors on an annual basis.
52. بما أن شروط ازدهار قطاع التأمين ومتطلبات العلاقة مع العملاء تتعارض مع متطلبات الحد من الاحتيال، يجب على الشركات إيجاد التوازن الصحيح بين أهداف التنمية، ورضى العميل، والكشف عن ممارسات الاحتيال. بالتالي، يجب المزاوجة بين الأهداف التشغيلية وأهداف التقليل من ممارسات الاحتيال كما يجب الحصول على موافقة مجلس الإدارة عليها في كل عام.



Monitoring

المراقبة

53. Companies must establish, for each business class and product, appropriate policyholder fraud indicators, trigger levels, and responses.

٥٣. يجب على الشركات وضع المؤشرات الملائمة للاحتيال الممارس من قبل المؤمن لهم، مدى خطورة هذا الاحتيال وكيفية التصدي له، وذلك على مستوى كل فرع من فروع التأمين وكل منتج تأميني.

Insurance Intermediaries Regulation 2011



إدارة مراقبة التأمين
INSURANCE SUPERVISION DEPARTMENT

اللائحة التنظيمية لوسطاء وكلاء التأمين
INSURANCE INTERMEDIARIES REGULATION

Version 2.0 October 2011)



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Saudi Arabian Monetary Agency "SAMA"
Insurance Intermediaries Regulation

مؤسسة النقد العربي السعودي
اللائحة التنظيمية لوسطاء ووكلاء التأمين

Part 1: Introduction

الجزء الأول: مقدمة

Purpose:

الغرض:

1. This regulation presents the general principles and minimum standards that should be met by insurance agents and (re)insurance brokers when dealing with insurance companies and their existing and potential clients.
2. The objective of this regulation is to promote appropriate standards in the business of insurance services provision.
3. This regulation must be read in conjunction with the Law on Supervision of Cooperative Insurance Companies and its Implementing Regulations, as well as SAMA's Market Code of Conduct and any other regulation issued by SAMA.

١. تتضمن هذه اللائحة التنظيمية المبادئ العامة والحد الأدنى من المعايير التي يجب على وكلاء التأمين ووسطاء التأمين وإعادة التأمين الالتزام بها عند التعامل مع شركات التأمين والعملاء الحاليين والمتوقعين.
٢. تهدف هذه اللائحة التنظيمية إلى تشجيع الالتزام بالمعايير الملائمة عند تقديم الخدمات التأمينية.
٣. يجب أن تقرأ هذه اللائحة التنظيمية بنظام مراقبة شركات التأمين التعاوني ولائحته التنفيذية واللائحة التنظيمية لسلوكيات سوق التأمين الصادرة عن مؤسسة النقد العربي السعودي إضافةً إلى أي لوائح أو قواعد أو تعليمات تنظيمية أخرى صادرة عن المؤسسة.

Definitions:

تعريفات:

4. The term "Intermediaries" in this Regulation is intended to include insurance agents and (re)insurance brokers.

٤. يشمل مصطلح "الوسطاء والوكلاء" الوارد في هذه اللائحة التنظيمية؛ وكلاء التأمين ووسطاء التأمين وإعادة التأمين.

An Insurance agent is defined as a

ويُعرف وكيل التأمين بأنه شخص اعتباري



juristic entity that for compensation represents the insurance company to solicit, procure and negotiate insurance contract.

An Insurance broker is defined as a juristic entity that for compensation negotiates with the insurance company in order to conduct insurance services for policyholders.

A Reinsurance broker is defined as a juristic entity that negotiates contracts of reinsurance between an insurance company and a reinsurance company on behalf of the insurance company, receiving commission for placement and other services rendered from the reinsurance company.

The term "Clients" is defined as the existing and potential recipients who request or acquire an insurance product or service.

The rest of terms which are not mentioned above and used in this regulation shall have the same meaning as per article one of the Implementing Regulations.

يقوم لقاء مقابل مادي بتمثيل الشركة، وتسويق وبيع وثائق التأمين، إضافةً إلى أي عمل يقوم به لحساب الشركة أو نيابة عنها.

يُعرف وسيط التأمين بأنه شخص اعتباري يقوم لقاء مقابل مادي بالتفاوض مع الشركة لإتمام عملية التأمين لصالح المؤمن لهم.

يُعرف وسيط إعادة التأمين بأنه شخص اعتباري يقوم لقاء مقابل مادي بالتفاوض مع شركات إعادة التأمين لإتمام إعادة التأمين لصالح شركة التأمين، ويحصل على عمولة نظير تفعيل اتفاقيات إعادة التأمين وخدمات التأمين الأخرى التي تقدمها شركة إعادة التأمين.

يُطلق مصطلح "العملاء" على أي متلقي حالي أو متوقع للخدمات التأمينية، يطلب أو يحصل على أحد المنتجات أو الخدمات التأمينية.

يكون للمصطلحات المستخدمة في هذه اللائحة التنظيمية - غير الواردة أعلاه - المعاني نفسها الواردة في المادة الأولى من اللائحة التنفيذية.

Compliance Measures:

إجراءات الالتزام:

5. Intermediaries must establish appropriate internal controls and procedures to ensure and monitor compliance with this regulation, including controls and procedures of their contracts with insurance companies, with other insurance service providers and with Clients.

٥. يجب على الوسطاء والوكلاء وضع الضوابط والإجراءات الداخلية الملائمة لضمان ومراقبة الالتزام بهذه اللائحة، بما في ذلك الضوابط والإجراءات المتعلقة بالعقود المبرمة بينهم وبين شركات التأمين وشركات



المهن الحرة الأخرى والعملاء.

٦. يجب على الوسطاء والوكلاء الاحتفاظ بسجلات كافية توضح التزامهم بهذه اللائحة، بما في ذلك على سبيل المثال وليس الحصر الاحتفاظ بتقارير الالتزام وسجلات الوثائق وسجلات المطالبات وسجلات الشكاوى.
6. Intermediaries must maintain adequate records to demonstrate compliance with this regulation, including, but not limited to, compliance reports, policy records, claims records and complaints records.

Non-Compliance:

عدم الالتزام:

٧. يُعد عدم الالتزام بالشروط والمتطلبات الواردة في هذه اللائحة التنظيمية مخالفاً لنظام مراقبة شركات التأمين التعاوني ولائحته التنفيذية وشروط الترخيص، وقد يؤدي إلى اتخاذ إجراء نظامي ضد الوسطاء والوكلاء.
7. Non-compliance with the conditions and requirements set forth in this regulation will be deemed a breach of the Law on Supervision of Cooperative Insurance Companies and its Implementing Regulations and licensing conditions and may subject Intermediaries to enforcement action.

Part 2: Rules of Professional Conduct.

الجزء الثاني: قواعد السلوك المهني.

٨. يجب على الوسطاء والوكلاء الالتزام بقواعد السلوك المهني وتطبيق المتطلبات الآتية:
- أ) العمل بأمانة وشفافية ونزاهة وتنفيذ أي التزام للعملاء وشركات التأمين وإعادة التأمين وفقاً لما تنص عليه أنظمة المملكة العربية السعودية ولوائحها التنفيذية. وعند عدم وجود نظام يشمل هذه الالتزامات بالكامل؛ فيجب على الوسطاء والوكلاء الالتزام بأفضل الممارسات الدولية.
- ب) العمل في إطار المهنة المقبولة عند التعامل مع العملاء وشركات التأمين وإعادة
8. Intermediaries shall comply with the rules of professional conduct by fulfilling the following requirements:
- a) Act in an honest, transparent and fair manner, and fulfill all of their obligations towards Clients and insurance and reinsurance companies, as stipulated by Saudi Arabian laws and regulations. Where these obligations have not been fully codified, intermediaries should abide by internationally accepted best practices.
- b) Act within reasonable competence when dealing with Clients and insurance and reinsurance



companies. For this purpose, competence shall be acquired through training, experience, and consulting with experts when needed.

- c) Keep the employees' skills and knowledge about the insurance business up-to-date and be informed of the products and services available on the market.
- d) Take reasonable care in maintaining adequate managerial, financial, operational, and human resources to carry out their business and serve Clients.
- e) Communicate all relevant information including coverage details, conditions, exceptions and restrictions of the insurance policy to Clients in a timely manner, and ensure that Clients are aware of the commitment they are about to make to enable them to make a suitable decision.
- f) Take reasonable measures to ensure the accuracy and clarity of the information provided to and from Clients and make such information available in writing.
- g) Treat all data and information acquired about the insurance company and Clients with utmost confidentiality, and take appropriate measures to maintain the secrecy of confidential documents in their possession. This means that the data:
 - Must be obtained and used only for specified and lawful

التأمين، ويتحقق ذلك من خلال التدريب والخبرة المناسبين واستشارة الخبراء عند الحاجة.

ج) التحديث المستمر للمهارات والمعرفة التي يتمتع بها الموظفون العاملون لدى الوسطاء والوكلاء في مجال التأمين والاطلاع المستمر على المنتجات والخدمات المتاحة في السوق.

د) اتخاذ الحيلة المعقولة للحفاظ على الموارد الإدارية والمالية والتشغيلية والبشرية اللازمة للقيام بالعمل وخدمة العملاء.

هـ) إخطار العملاء قبل وقت كافٍ بجميع المعلومات ذات الصلة التي تتضمن تفاصيل التغطية، وأي شروط واستثناءات وقيود على وثيقة التأمين، والتأكد من فهم العملاء أي التزام يترتب على العقود المبرمة لمساعدتهم على اتخاذ القرار المناسب.

و) اتخاذ تدابير معقولة لضمان دقة ووضوح المعلومات المقدمة من العملاء والمقدمة إليهم مع توفير هذه المعلومات كتابياً.

ز) التعامل مع جميع البيانات والمعلومات التي يتم الحصول عليها بشأن شركة التأمين والعملاء بأقصى درجات السرية، واتخاذ تدابير ملائمة للحفاظ على سرية أي مستند خاص بحوزتهم مع ضرورة القيام بالآتي:

- الحصول على البيانات واستخدامها



- purposes.
- Must be kept secure and up-to-date.
 - Must commit to provide data about insurance coverage to Clients upon their written request.
 - Must not be disclosed to any third party without prior authorization from SAMA, with the exception of the companies' external auditors.
- h) Must not motivate Clients to revoke a valid insurance policy, and must not motivate Clients to refuse a quotation given by a competitor using false or unfair evaluation in order to merely increase commissions.
- i) Ensure that Clients fully understand the services provided by the Intermediaries and the nature of the relationship between both parties.
- j) Notify the insurance company of any information or documents related to Clients which might affect the decision of the insurance company to provide the coverage and at which rates and conditions.
- k) Immediately notify Clients about the acceptance or rejection of the coverage by the insurance company.
- l) Explain to Clients the mechanism of paying the insurance premiums and any other additional proceeds the
- لأغراض محددة ونظامية فقط.
- الحفاظ على أمن البيانات وتحديثها.
- الالتزام بتقديم البيانات الخاصة بالغطاء التأميني إلى العملاء بعد تقديم طلب مكتوب للحصول عليها.
- عدم الإفصاح عن أي بيانات لأي طرف آخر دون الحصول على إذن مسبق من مؤسسة النقد العربي السعودي، ويستثنى من ذلك المراجعون الخارجيون التابعون للوسطاء والوكلاء.
- ح) يجب على الوسطاء والوكلاء عدم تشجيع العملاء على إلغاء وثيقة تأمين سارية وعدم تشجيع العملاء على رفض أي عرض مقدم من جهة منافسة بناءً على تقييم خاطئ أو غير عادل لمجرد زيادة العمولة المكتسبة.
- ط) التأكد من فهم العملاء للخدمات التي يقدمها الوسطاء والوكلاء وطبيعة العلاقة بين الطرفين فهماً تاماً.
- ي) إخطار شركة التأمين بأي معلومات أو مستندات متعلقة بالعملاء قد تؤثر على القرار الذي تتخذه شركة التأمين عند تقديم التغطية التأمينية وأسعارها وشروطها.
- ك) إخطار العملاء فوراً بقرار شركة التأمين عند قبول تقديم التغطية التأمينية أو رفضها.
- ل) على الوسطاء والوكلاء إيضاح آلية سداد الأقساط التأمينية وأي مبالغ أخرى إضافية



insurance company is entitled to.

مستحقة لشركة التأمين لعملائها.

9. In addition to the general rules, brokers shall comply with the following:

٩. إضافةً إلى القواعد العامة؛ يجب على الوسطاء الالتزام بالآتي:

- a) Take reasonable measures to identify and address conflict of interest to ensure fair treatment to all Clients. Where conflict of interest arises, brokers must not unfairly place their interests above those of their Clients.

أ) اتخاذ تدابير معقولة لتحديد حالات التعارض في المصالح والتعامل معها لضمان التعامل العادل مع العملاء جميعهم. وعند وجود تعارض في المصالح؛ يجب على الوسطاء عدم وضع مصلحتهم بصورة غير عادلة فوق مصلحة عملائهم.

- b) Present to each client a comparison between the prices and coverage of insurance policies tailored to the client's needs and offered by different insurance companies, then recommend an insurance policy and explain to the client the reason for choosing it and the conditions, benefits, and exclusions it includes.

ب) تقديم مقارنة لكل عميل عن أسعار ونطاق تغطية وثائق التأمين المعدة لتلبية احتياجات العميل التي تقدمها شركات التأمين المختلفة مع التوصية بإحدى هذه الوثائق للعميل وتوضيح سبب اختيارها وشروطها وفوائدها واستثناءاتها.

- c) Do not favor companies they are associated with.

ج) عدم تفضيل شركات التأمين التي يرتبط الوسيط بعلاقة معها.

- d) Do not choose or recommend insurance coverage from an insurance company based on the commissions granted to the broker.

د) عدم اختيار التغطية التأمينية التي تقدمها إحدى شركات التأمين أو التوصية بها لمجرد تقديم الشركة عمولات أعلى للوسيط.

Part 3: Requirements for Opening Branches

الجزء الثالث: متطلبات فتح الفروع

10. Brokers shall not have more than one branch in each province in the Kingdom, and shall not exceed a total of five branches within the Kingdom.

١٠. يجب على الوسطاء أن لا يكون لهم أكثر من فرع واحد في كل منطقة إدارية من مناطق المملكة، وأن لا يتجاوز إجمالي عدد الفروع في المملكة خمسة فروع.



11. Agents shall have a maximum of five branches when their capital is of SR 500,000. Agents must increase their capital by SR 100,000 for every additional branch.
١١. يسمح للوكلاء بخمسة فروع عند بلوغ رأس المال ٥٠٠,٠٠٠ ريال. وعند طلب الوكيل عدداً من الفروع يزيد عن ذلك؛ فعليه زيادة رأس المال بمبلغ لا يقل عن مئة ألف ريال عن كل فرع إضافي.
12. Agents must obtain the approval of the represented insurance company for their branch expansion plan. Insurance companies, in turn, must regularly oversee and review the operations of these branches, and are held accountable in case of the agent's non-compliance with the professional standards, requirements and criteria set forth in this regulation.
١٢. يجب على الوكلاء الحصول على موافقة شركة التأمين على أي خطة للتوسع وفتح الفروع. ويجب على شركة التأمين مراقبة ومراجعة عمليات الفروع بشكل مستمر وتحمل الشركة المسؤولية المترتبة على عدم التزام الوكيل بمعايير المهنة والضوابط والشروط الواردة في هذه اللائحة.
13. In addition, Intermediaries looking to open new branches must meet the following requirements:
١٣. يجب على الوسطاء والوكلاء الراغبين في فتح فروع جديدة الالتزام بالمتطلبات الآتية:
- a) Obtain SAMA's approval for the location of the new branch.
- أ) الحصول على موافقة المؤسسة على موقع الفرع.
- a) Provide SAMA with a list of addresses of all branches to be opened, the names of the employees that will work at these branches, their qualifications, and experience.
- ب) تزويد المؤسسة ببيان وافٍ يتضمن عناوين جميع الفروع المراد فتحها وأسماء الموظفين الذين سوف يعملون بها ومؤهلاتهم وخبراتهم.
- b) Provide SAMA with the objectives and reasons behind opening the new branch.
- ج) إبلاغ المؤسسة بأهداف وأسباب فتح أي فرع.
- c) Complete all regulatory licenses, records, and certifications required to open a new branch, e.g., license from the municipality, the Civil Defense, the Ministry of Commerce and Industry and any other licenses required.
- د) استكمال التراخيص والسجلات والشهادات النظامية اللازمة لفتح الفرع مثل ترخيص البلدية، الدفاع المدني، وزارة التجارة والصناعة، وأي ترخيص آخر.



d) Meet the Saudization requirements, stipulated in the Implementing Regulations, in each branch.	هـ) الالتزام بمتطلبات اللائحة التنفيذية المتعلقة بشأن نسب السعودة في كل فرع.
e) Have an information system at the branch that is connected to the intermediary's IT system.	و) توافر شبكة معلوماتية مرتبطة بالنظام الآلي الخاص بالشركة.
f) Have internal control measures to oversee the operations of each branch.	ز) توافر آلية للرقابة الداخلية على عمليات الفرع.
g) Have an adequate and secure system to retain money at the branch.	ح) وجود آلية مناسبة وأمنة لحفظ الأموال في الفرع.
h) Have a system to document and maintain data related to the insurance policies underwritten by the branch, e.g., policyholders' names, addresses, as well as, insurance policies' dates, durations, premium rates and conditions.	ط) وجود نظام قيد وحفظ للبيانات الخاصة بوثائق التأمين التي تم بيعها من خلال الفرع يتضمن بيان أسماء وعناوين حملة الوثائق، وتاريخ إبرام كل وثيقة، ومدة سريانها، والأقساط والشروط التي تشتمل عليها.
i) Ensure that branch employees possess adequate qualifications to deal with, combat, and report financial crimes.	ي) التأكد من توافر الكفاءة المطلوبة لموظفي الفرع في التعامل مع الجرائم المالية ومكافحتها والإبلاغ عنها.
j) Ensure that the branch customer service employees apply the required customer due diligence in knowing their clients.	ك) التأكد من تطبيق موظفي خدمة العملاء إجراءات التحقق الواجبة لإزاء هوية العملاء.

Part 4: Requirements for Bancassurance activities

الجزء الرابع: متطلبات عمليات التأمين المصرفي

14. Bancassurance activities must be conducted through licensed insurance agents, i.e., Bancassurance agents, which are subject to all applicable regulations thereof.	١٤. يجب أن تتم عمليات التأمين المصرفي عبر وكلاء مرخصين خاضعين لجميع الأنظمة ذات العلاقة.
15. The Bancassurance agency and the bank must sign a distribution	١٥. على وكالة التأمين المصرفي والمصرف



- agreement. Prior approval on the distribution agreements must be obtained from SAMA. The agreement must include but is not limited to:
- توقيع عقد توزيع، ويجب الحصول على موافقة المؤسسة المسبقة على العقد وأن يشتمل العقد حداً أدنى على الآتي:
- a) Insurance products to be marketed (أ) منتجات التأمين التي سيتم تسويقها.
- b) Allocation of expenses to the agency (ب) تحميل المصاريف المتعلقة بالوكالة لها.
- c) Trainings of bank staff (ج) تدريب موظفي المصرف.
- d) Cash collection procedures (د) إجراءات تحصيل الأموال.
16. The Bancassurance agency should submit a request to SAMA for obtaining an approval on its insurance products that will be sold in Banks.
١٦. يجب أن تحصل وكالة التأمين المصرفي على موافقة المؤسسة على منتجات التأمين التي سيتم بيعها في المصرف.
17. The bancassurance agency must obtain SAMA's approval before introducing an approved insurance product to any new bank branch.
١٧. يجب على وكالة التأمين المصرفي الحصول على موافقة المؤسسة قبل عرض أي منتج تأميني، تمت الموافقة عليه، في فرع مصرفي جديد.
18. Insurance products must be sold and marketed independently from banking products, as such:
١٨. يجب بيع أو تسويق منتجات التأمين باستقلالية عن المنتجات المصرفية ومن ذلك:
- a) Insurance products must not be marketed or sold by staff involved in selling or marketing banking products (أ) عدم بيع أو تسويق منتجات التأمين من قبل موظفين معينين ببيع أو تسويق منتجات مصرفية.
- b) Insurance products must not be bundled with banking products for marketing and selling purposes. (ب) لا يجوز جمع المنتجات المصرفية والمنتجات التأمينية في باقة واحدة لغرض البيع أو التسويق أو كليهما معاً.
19. All bank staff involved in selling insurance products must pass the Insurance Foundation Certificate Exam
١٩. على جميع موظفي المصرف المعنيين ببيع منتجات التأمين الحصول على شهادة



أساسيات مهنة التأمين.

٢٠. على وكالة التأمين المصرفي تزويد المؤسسة بخطة تدريب سنوية لموظفي المصرف المخولين بيع منتجات التأمين، على أن تتضمن حداً أدنى الآتي:
- أ) التدريب على أساليب البيع.
- ب) التدريب على المنتجات.
- ج) التدريب على مكافحة غسل الأموال ومكافحة تمويل الإرهاب.
- د) الأنظمة واللوائح ذات العلاقة.
٢١. على وكالة التأمين المصرفي تعيين مشرف تأمين مصرفي. على أن تشمل مهامه ومسؤولياته حداً أدنى الآتي:
- أ) الإشراف على بيع منتجات التأمين في فروع المصرف من خلال عمل زيارات دورية لهذه الفروع.
- ب) عقد دورات تدريبية لموظفي المصرف على منتجات التأمين.
- ج) وضع اجراءات للرقابة والتحقق من أن بيع منتجات التأمين يتم بطريقة صادقة وشفافة وعادلة.
٢٢. تكون وكالة التأمين المصرفي مسئولة بشكل كامل عن الآتي:
- أ) التأكد من الالتزام بإجراءات الرقابة في فروع البنك بهدف بيع منتجات التأمين
20. The Bancassurance agency must submit to SAMA, on a yearly basis, a training plan for the Bank's staff involved in selling insurance products. The plan should cover as a minimum the following:
- a) Selling techniques trainings
- b) Product specific trainings
- c) Anti-money laundering and combating terrorism finance
- d) Applicable laws and regulations
21. The Bancassurance agency must appoint a Bancassurance supervisor. The roles and responsibilities of the supervisor should include as a minimum:
- a) Supervise Bancassurance sales activities in bank branches by conducting regular visits to branches
- b) Conduct ongoing trainings to bank staff on insurance products and sales
- c) Put in place all the proper controls, and validation to ensure delivery of insurance products in an honest, transparent and fair manner
22. The bancassurance agency is fully responsible to:
- a) Ensure compliance with controls, policies and procedures in bank branches in order to sell insurance



products in an honest, transparent, and fair manner

بطريقة صادقة وشفافة وعادلة.

b) Ensure that the insurance company's copy of client records is delivered securely and in a timely manner

ب) التأكد من حصول شركة التأمين على نسخة من سجل العميل بطريقة آمنة وخلال وقت مقبول.

C) Prepare and review monitoring reports for the bancassurance activities

ج) إعداد ومراجعة تقارير الرقابة على أعمال التأمين المصرفي.

D) Follow up on cash collection

د) متابعة تحصيل النقد.

Part 5: Requirements for Dealing With Insurance and Reinsurance Companies.

الجزء الخامس: متطلبات التعامل مع شركات التأمين وإعادة التأمين.

Section A: General Requirements

القسم أ: متطلبات عامة

Documentation:

حفظ المستندات:

23. Intermediaries shall document in books and records all data, information and documents related to the business they conduct with (re)insurance companies and policyholders including the following:

٢٣. يحتفظ الوسطاء والوكلاء بالبيانات والمعلومات والمستندات المتعلقة بالعمل الجاري مع شركات التأمين وشركات إعادة التأمين والمؤمن لهم في سجلات ودفاتر بما في ذلك الآتي:

a) Name and address of the represented party:

أ) اسم الطرف الذي يمثله الوسيط والوكيل وعنوانه:

- Insurance company in the case of an agent and reinsurance broker.
- Client in the case of a broker.

- شركة التأمين في حالة وكيل التأمين ووسيط إعادة التأمين.
- العميل في حالة وسيط التأمين.

b) A copy of the agreement executed with the represented party:

ب) نسخة من الاتفاق المبرم مع الطرف الذي يمثله الوسيط:

- Agency agreement in the case of



- an agent.
- Broker client agreement in the case of a broker.
- c) Copy of Clients' insurance policies.
- d) Business related memorandums and correspondences.
- e) Insurance proposal forms received on behalf of insurance companies.
- f) Clients names as well as the date of issuance of the insurance policy and the collection of premiums.
- g) Book keeping related to premiums received or claims paid or any other financial transaction related to the insurance business.
- h) Bank accounts related to the insurance business.
24. Intermediaries shall keep the books and records for a period of no less than ten years from the date of termination or end of the concerned insurance policy.
- Premium Collection and Segregation of Accounts:**
25. Insurance companies are considered to have received the premiums once the premiums are received by their agents.
26. Intermediaries must ensure the security of clients' assets held on their behalf. Any premiums collected by Intermediaries must be either placed in a separate bank account (the premium
- اتفاق الوكالة في حالة الوكيل.
- الاتفاق المبرم بين الوسيط والعميل في حالة الوسيط.
- ج) نسخة من وثائق تأمين العملاء.
- د) المذكرات والمراسلات التي تمت بين الطرفين.
- هـ) نماذج طلب التأمين المستلمة بالنيابة عن شركات التأمين.
- و) أسماء العملاء وتاريخ إصدار وثيقة التأمين وأقساط التأمين المحصلة.
- ز) الاحتفاظ بالسجلات المحاسبية ذات الصلة بأقساط التأمين المحصلة والمطالبات المسددة وأي تعامل مالي آخر ذو علاقة بأعمال التأمين.
- ح) الحسابات البنكية ذات الصلة بأعمال التأمين.
٢٤. يحتفظ الوسطاء والوكلاء بالدفاتر المحاسبية والسجلات لمدة لا تقل عن عشر سنوات من تاريخ انتهاء وثيقة التأمين أو إلغائها.
- تحصيل أقساط التأمين وفصل الحسابات:
٢٥. تعد شركات التأمين مستلمة أقساط التأمين عند استلام الوكيل لها.
٢٦. يجب على الوسطاء والوكلاء ضمان سلامة موجودات العملاء التي يحتفظ بها الوسطاء والوكلاء نيابة عنهم، مع ضرورة إيداع أي



account) that has been established for that purpose, or passed directly to the insurance company. Cash payments must generate a receipt to the client and must go immediately into the premium account.

أقساط تأمينية يحصلها الوسطاء أو الوكلاء؛ في حساب بنكي منفصل (حساب الأقساط التأمينية) يُفتح لهذا الغرض أو تحويل هذه المبالغ إلى شركة التأمين مباشرة. وفي حالة الدفع نقداً يجب على الشركة أن تصدر إيصال قبض للعميل وأن تحول المبلغ فوراً إلى حساب الأقساط التأمينية.

27. Intermediaries must not treat the premiums account as their own in any sense; in particular, as security for any loan.

٢٧. يجب على الوسطاء والوكلاء عدم التعامل مع حساب الأقساط التأمينية على أنه حساب خاص بهم لأي سبب، ولا سيما أن يكون اتخاذ الحساب ضماناً للحصول على قرض.

28. Intermediaries shall remit all the premiums collected from insurance contracts concluded on behalf of the insurance company, to the insurance company's account in a period not exceeding 7 working days from the date of collection from Clients, as well as, providing the insurance company with a detailed report of these premiums.

٢٨. يلتزم الوسيط والوكيل بتحويل جميع الأقساط التأمينية الناتجة من عقود التأمين المحصلة نيابةً عن شركة التأمين إلى حساب شركة التأمين خلال مدة لا تتجاوز سبعة أيام عمل من تاريخ تحصيلها من العملاء وتزويد شركة التأمين بتقرير مفصل عن هذه الأقساط.

29. The intermediary is responsible to carry out all necessary efforts to collect premiums from policyholders. In case the policyholder fails to pay, the intermediary must immediately notify the insurance company.

٢٩. يلتزم الوسيط والوكيل ببذل الجهد اللازم لجمع الأقساط من المؤمن لهم، وفي حال عدم الدفع من المؤمن له؛ يجب على الوسيط أو الوكيل إخطار الشركة فوراً.

Agreements Between Intermediaries and Insurance Companies:

الاتفاقيات بين الوسطاء/الوكلاء وبين شركات التأمين:

30. The agency or brokerage agreement concluded between the intermediary and the insurance company shall determine the rights and obligations of

٣٠. توضح اتفاقية الوكالة أو الوساطة المبرمة بين الوسيط أو الوكيل وبين شركة التأمين



- each of them, including the following:
- حقوق والتزامات كل منهم بما يتضمنه الآتي:
- a) Type and classes of insurance in which the intermediary is allowed to practice the insurance business.
 - أ) نوع وفئات التأمين التي يُسمح للوسيط والوكيل مزاوله العمل فيها.
 - b) Duration of the agreement and possible causes of termination.
 - ب) مدة الاتفاقية والأسباب المتوقعة لإنهائها.
 - c) Means for calculating the commission of Intermediaries for the service provided.
 - ج) طريقة حساب عمولة الوسيط والوكيل نظير الخدمات المقدمة.
 - d) The limit per insurance policy that the agent is allowed to sell.
 - د) الحد الذي يُسمح للوكيل ببيعه لكل وثيقة تأمين.
 - e) The standards to be followed and complied with by the intermediary.
 - هـ) المعايير التي يجب على الوسيط والوكيل اتباعها والالتزام بها.
 - f) The rights of the insurance company to review the intermediary's books and records related to its accounts.
 - و) حقوق شركة التأمين في مراجعة دفاتر الوسيط والوكيل وسجلاته المتعلقة بحساباتها.

Section B: Requirements for Agents

القسم ب: المتطلبات على الوكلاء

Obligations of an Agent Towards the Represented Insurance Company:

التزامات الوكيل نحو شركة التأمين التي يمثلها:

31. Agents shall:

٣١. يجب على الوكيل الآتي:

- a) Note on all official papers, correspondences and documents their license number, as well as the name of the represented insurance company.
- أ) إيضاح رقم الترخيص على الأوراق والمراسلات والمستندات الرسمية إضافة إلى اسم شركة التأمين التي يمثلها.
- b) Comply with the insurance policy limits that they are authorized to sell as set in the contract binding the agent to the represented insurance company.
- ب) الالتزام بحدود وثائق التأمين المسموح بيعها وفقاً للاتفاق الذي يلزم الوكيل تجاه شركة التأمين التي يمثلها.
- c) Not represent more than one
- ج) عدم تمثيل أكثر من شركة تأمين دون



- insurance company without obtaining the prior approval of SAMA موافقة المؤسسة على ذلك.
- d) Provide to the insurance company their compliance and internal control manuals if requested to do so. (د) تزويد شركة التأمين بأدلة الالتزام والرقابة الداخلية عند طلبها منه.
- e) Obtain the approval of SAMA for any changes occurring on the agency agreement with the represented insurance company. (هـ) أخذ موافقة المؤسسة قبل أي تغيير يحدث في اتفاق الوكالة المبرم مع شركة التأمين التي يمثلها الوكيل.
32. Agents must request SAMA's prior approval to terminate the agency agreement with a represented insurance company and sign a new agency agreement to represent another insurance company. To request such approval, agents must provide SAMA with:
32. على الوكلاء أخذ موافقة المؤسسة على عمليات إنهاء عقد الوكالة مع شركة التأمين والتعاقد مع شركة تأمين أخرى. ولطلب هذه الموافقة عليهم تقديم الآتي إلى مؤسسة النقد:
- a) Reasons for terminating the agency agreement with the current insurance company (أ) أسباب إلغاء الاتفاقية مع شركة التأمين الحالية.
- b) Insurance company that the agent plans to sign an agreement with and a draft of the agency agreement (ب) شركة التأمين التي يرغب الوكيل التعاقد معها مع إرفاق مسودة اتفاقية الوكالة.
- c) Commissions rates to be received from the insurance company (ج) العمولات التي سيحصل عليها الوكيل من شركة التأمين.
33. After obtaining SAMA's approval to terminate the agency agreement, the agent shall:
33. بعد أخذ موافقة المؤسسة لإنهاء عقد الوكالة يتعين على الوكيل الآتي:
- a) Sign a financial settlement of accounts with the current insurance company (أ) توقيع مخالصة مالية مع شركة التأمين الحالية.
- b) Inform the public of ceasing the agreement through announcements in local newspapers (ب) الإعلان عبر الصحف المحلية عن إنهاء الاتفاقية.



- c) Stop selling insurance products for a transitory period of 60 days and take all necessary measures to terminate the association with the insurance company, including: removing the company's signboards from its branches, delivering sales registers, and names of users and passwords of electronic systems related to the company and settle all pending financial matters between both parties

ج) التوقف عن بيع منتجات التأمين فترة انتقالية مدتها ستون يوماً والقيام بكل الإجراءات التي توضح إنهاء التعاقد ومنها إزالة لوحات الفروع وتسليم دفاتر البيع وأسماء المستخدمين وكلمات المرور لأنظمة الإلكترونيات الخاصة بالشركة وتسوية ما تبقى من أمور مالية بين الطرفين.

Section C: Requirements for Brokers

القسم ج: متطلبات على الوسطاء

Obligations of a Broker Towards the Insurance Company:

التزامات الوسيط نحو شركة التأمين:

34. Brokers shall:

٣٤. يجب على الوسيط:

- a) Note their license number on all papers, correspondences and documents.
- b) Provide the insurance company with information that enables it to assess the risk to be insured or renew its insurance with the knowledge and approval of Clients.
- c) Be knowledgeable about insurance markets, insurance law and prevailing regulations, and follow-up on the developments occurring therein.
- d) Provide assistance in negotiations between the insurance company and Clients concerning claims arising from the risk insured.
- e) Obtain written approval from SAMA prior to placing risks with

- أ) إيضاح رقم الترخيص على جميع الأوراق والمراسلات والمستندات.
- ب) تزويد شركة التأمين بالمعلومات التي تمكنها من تقييم المخاطر التي سيتم التأمين عليها أو إعادة تأمينها بمعرفة العملاء وموافقتهم.
- ج) المعرفة بأسواق التأمين ونظام التأمين واللوائح السارية ذات الصلة ومتابعة التطورات التي تحدث فيها.
- د) تقديم المساعدة في المفاوضات التي تجري بين شركة التأمين وبين العملاء بشأن المطالبات الناتجة عن المخاطر المؤمن عليها.
- هـ) الحصول على موافقة مكتوبة من



foreign insurance companies to cover risks that cannot be covered through a licensed company in the Kingdom.

مؤسسة النقد العربي السعودي قبل إسناد المخاطر إلى شركات التأمين الأجنبية التي لا يمكن تغطيتها من خلال إحدى الشركات المرخص لها في المملكة.

Part 6: Requirements for Dealing With Policyholders.

الجزء السادس: متطلبات التعامل مع المؤمن لهم.

Section A: Pre-Sale Client Contact

القسم أ: التواصل مع العملاء قبل البيع

Advertising:

الإعلان:

35. Intermediaries shall:

٣٥. يجب على الوسطاء والوكلاء:

- Ensure that advertisements are not misleading, over-stated or offensive.
- Ensure in the case of an insurance broker that advertisements are not restricted to the policies of one insurance company.
- Ensure that advertisements neither contain anything which is in breach of the law nor omit anything which the law requires.
- Ensure that advertisements do not abuse the trust of Clients or exploit their lack of experience or knowledge.
- Proper written approval should be obtained from the relevant insurance company if the advertisement has any reference to that insurance company.

- التأكد من أن الإعلانات غير مضللة أو مبالغ فيها، و ألا تكون مضرة بأحد.
- التأكد في حالة وسيط التأمين من أن الإعلانات لا تقتصر على وثائق التأمين التي تقدمها شركة تأمين واحدة.
- التأكد من أن الإعلانات لا تحتوي على ما يخالف الأنظمة وعدم إغفالها أي مطلب نظامي.
- التأكد من أن الإعلانات لا تسيء إلى ثقة العملاء أو تستغل عدم وجود الخبرة أو المعرفة لديهم.
- ينبغي الحصول على موافقة خطية من شركة التأمين ذات الصلة إذا كان الإعلان له أي إشارة إلى شركة التأمين.



Advice:

تقديم النصيحة:

36. Intermediaries shall provide advice on the matters within their field of expertise and seek or recommend specialists if necessary.

٣٦. يقدم الوسطاء والوكلاء النصيحة بشأن الأمور التي تقع في نطاق خبرتهم وعليهم السعي للحصول على مساعدة الخبراء أو التوصية بالاستعانة بهم عند الضرورة.

37. Insurance brokers shall provide advice, technical consultation and the most suitable policy conditions and prices for Clients by contacting a number of insurance companies.

٣٧. يقدم وسطاء التأمين النصيحة والمشورة الفنية وعرض أنسب الشروط والأسعار الخاصة بوثائق التأمين للعملاء من خلال التواصل مع عدد من شركات التأمين.

Client Service:

خدمة العملاء:

38. Intermediaries shall:

٣٨. يجب على الوسطاء والوكلاء:

- a) Understand the terms and conditions of all policies offered to Clients.
b) Understand Clients' profile, coverage needs, and appetite for risk.

أ) فهم بنود جميع وثائق التأمين المقدمة للعملاء وشروطها.
ب) فهم حالة العميل واحتياجاته من التغطية التأمينية ومدى قدرته على تحمل جزء من المخاطر.

Legal Requirements:

المتطلبات النظامية:

39. Intermediaries shall ensure that any documents issued comply with all statutory and regulatory requirements.

٣٩. على الوسطاء والوكلاء التأكد من أن جميع المستندات الصادرة منهم تتفق مع المتطلبات النظامية والرقابية.

40. Brokers shall obtain a written approval to represent Clients with the (re)insurance company.

٤٠. على الوسطاء الحصول على تفويض مكتوب لتمثيل العملاء لدى شركة التأمين أو إعادة التأمين.



Documentation:

حفظ المستندات:

41. Intermediaries shall:

٤١. يجب على الوسطاء والوكلاء:

a) Ensure that all written terms and conditions are fair in substance and that the Clients' rights and responsibilities are set out, clearly and in plain and understandable language.	أ) التأكد من أن جميع البنود والشروط المكتوبة تتسم بالنزاهة في جوهرها وأن توضح حقوق العملاء ومسؤولياتهم بلغة ميسرة ومفهومة.
b) Send policy documentation to Clients without avoidable delay.	ب) إرسال مستندات وثائق التأمين إلى العملاء دون تأخير غير مبرر.
c) Send a written advice along with the policy documentation stressing on the importance of reading it carefully.	ج) إرسال إشعار مكتوب مع وثيقة التأمين يؤكد أهمية قراءة الوثيقة بعناية.
d) Ensure that instruction letters, policies and renewal documents contain details of complaints handling procedures.	د) التأكد من أن خطابات التعليمات ووثائق التأمين ومستندات التجديد تحتوي على تفاصيل إجراءات التعامل مع الشكاوي.

Reinsurance:

إعادة التأمين:

42. Reinsurance brokers shall:

٤٢. يجب على وسطاء إعادة التأمين:

a) Maintain proper records of the insurance company's business to be used by reinsurance companies.	أ) الاحتفاظ بسجلات كافية عن أعمال شركة التأمين لتزويد شركات إعادة التأمين بها.
b) Render advice based on knowledge of the reinsurance coverage available in the reinsurance markets.	ب) تقديم النصيحة استناداً إلى المعرفة بالمتوافر من غطاء إعادة التأمين المتاح في أسواق إعادة التأمين.
c) Maintain a database with the ratings of (re)insurance companies.	ج) الحفاظ على قاعدة بيانات عن التصنيف الائتماني لشركات التأمين وشركات إعادة التأمين.



- d) Select and recommend a (re)insurance company or a group of (re)insurance companies. (د) اختيار شركة من شركات التأمين أو إعادة التأمين أو مجموعة من الشركات والتوصية بها.
- e) Assist in the update of (re)insurance contracts. (هـ) المساعدة في تحديث عقود التأمين أو إعادة التأمين.
- f) Exercise due care and diligence with the selection of (re)insurance companies taking into consideration their respective ratings. (و) تحري العناية والحيطه اللزمتين عند اختيار شركات التأمين أو إعادة التأمين مع الأخذ في الاعتبار التصنيفات الانتمائية الخاصة بها.

Section B: Sale of Insurance Products and Services

القسم ب: بيع المنتجات والخدمات التأمينية

Sales Practices:

ممارسات البيع:

43. Intermediaries shall:

٤٣. يجب على الوسطاء والوكلاء:

- a) Ensure Clients understand the type of service being offered. (أ) التأكد من فهم العملاء نوع الخدمة المقدمة.
- b) Ensure that the policy proposed is suitable for the Clients' needs. (ب) التأكد من أن وثيقة التأمين المقترحة مناسبة لاحتياجات العملاء.
- c) Provide Clients with comparisons in terms of price, coverage and services offered when choice among several products is available. (ج) تقديم مقارنة للعملاء من حيث السعر والتغطية والخدمات المقدمة في حال توافر عدد من المنتجات.
- d) Notify Clients promptly if unable to obtain the requested insurance. (د) إخطار العملاء فوراً في حال عدم التمكن من الحصول على الخدمة التأمينية المطلوبة.
- e) State the period for which the quotation remains valid if the proposed contract is not entered into immediately. (هـ) تحديد مدة عرض الأسعار في حال عدم إبرام العقد المقترح على الفور.
- f) Explain to Clients their obligation to notify claims promptly and to disclose all material facts relevant to (و) الإيضاح للعملاء عن ضرورة التزامهم بالإبلاغ عن المطالبات فوراً والإفصاح عن



the coverage.

الحقائق الجوهرية المتعلقة بالتغطية التأمينية
جميعها.

Information Furnishing:

تقديم المعلومات:

44. Intermediaries shall:

٤٤. يجب على الوسطاء والوكلاء:

- a) Request Clients to make true, fair and complete disclosure and ensure that the consequences of non-disclosure of information and inaccuracies are pointed out to clients. (أ) الطلب من العملاء الإفصاح عن المعلومات بصورة صحيحة وواضحة وثامة والتأكد من توضيح عواقب عدم الإفصاح عن المعلومات أو عدم تحريي الدقة فيها للعملاء.
- b) Avoid influencing and pressuring Clients and make it clear that all the answers or statements given are his/ her own responsibility. (ب) تجنب التأثير أو الضغط على العملاء مع إيضاح أن الإجابات والبيانات المقدمة جميعها من مسؤولية العميل.
- c) Require Clients to carefully check the information given in the documents. (ج) الطلب من العملاء فحص المعلومات الواردة في المستندات بعناية.
- d) Explain to Clients the importance of disclosing all subsequent changes that might affect the coverage throughout the duration of the policy. (د) الإيضاح للعملاء عن أهمية الكشف عن جميع التغييرات اللاحقة التي قد تؤثر على التغطية التأمينية خلال مدة وثيقة التأمين.
- e) Disclose on behalf of Clients all material facts within their knowledge and give a fair presentation of the risk profile of Clients to the insurance company. (هـ) الإفصاح نيابة عن العملاء عن جميع الحقائق المادية التي تقع في إطار معرفتهم وتقديم عرض واضح لشركة التأمين عن وصف مخاطر العملاء.

Contract Explanation:

تفسير العقود:

45. Intermediaries shall:

٤٥. يجب على الوسطاء والوكلاء:

- a) Explain all the essential provisions of the coverage provided by the policy to Clients. (أ) إيضاح جميع الأحكام الضرورية الخاصة بالتغطية التأمينية التي توفرها وثيقة التأمين للعملاء.



- b) Quote terms exactly as provided by the insurance company. ب) إخطار العملاء بعرض شركة التأمين كما ورد من الشركة.
- c) Draw attention to any warranty imposed under the policy, major or unusual restrictions, exclusions, and explain how the contract may be cancelled. ج) تنبيه العملاء بوجود تعهدات أو قيود أو استثناءات كبيرة أو غير عادية في وثيقة التأمين وشرح الكيفية التي قد يلغى العقد من خلالها.
- d) Provide a list of insurance companies participating in the coverage and advice of any subsequent changes thereafter. (Applicable for brokers only) د) تقديم قائمة بشركات التأمين المشاركة في توفير التغطية التأمينية وتقديم النصح بشأن أي تغييرات لاحقة (تطبق على الوسيط فقط).

Remuneration:

الأتعاب:

46. Intermediaries must obtain SAMA's approval to receive a commission rate that exceeds the rates specified in Appendix A (Maximum Commission Rates Permitted) of this regulation ٤٦. يجب على الوسطاء والوكلاء الحصول على موافقة المؤسسة على أي نسبة عمولة تتجاوز النسب المذكورة في الملحق (أ) لهذه اللائحة (الحد الأقصى للعمولات المسموح به)
47. Intermediaries shall: ٤٧. يجب على الوسطاء والوكلاء:
- a) Disclose to Clients the amount of proceeds and commissions they are receiving for the policy being contracted by Clients. أ) الإفصاح عن الأرباح والعمولات الخاصة بوثيقة التأمين المتعاقد عليها مع العملاء.
- b) Inform Clients in writing of any additional fees or charges for any related services. ب) إخطار العملاء كتابةً بأي رسوم أو نفقات إضافية مقابل أي خدمات ذات صلة.
48. (Re)insurance brokers who have established a business relationship with an insurance company and have identified potential clients are entitled to receive their commission proportionally to the paid premiums once the contract is entered into. Any attempt by the insurance company to ٤٨. يحق لوسطاء التأمين ووسطاء إعادة التأمين العاملين مع إحدى شركات التأمين الحصول على عمولة تتناسب مع الأقساط المدفوعة بمجرد إصدار الوثيقة مع العملاء المتوقعين. وتعد أي محاولة من شركة التأمين لتجنب



bypass the broker and deal with the client directly is considered an act of unauthorized disintermediation and is strictly prohibited. Such act should be reported to SAMA directly with supporting evidence.

الوسيط والتعامل مباشرة مع العميل إلغاء غير مصرح به لدور الوساطة ويحظر القيام بذلك. ويجب إبلاغ المؤسسة فوراً وتقديم الدليل المؤيد لذلك.

Section C: Post-Sale Client Servicing

القسم ج: خدمة العملاء بعد البيع

Data Confidentiality:

سرية البيانات:

49. Intermediaries shall:

٤٩. يجب على الوسطاء والوكلاء:

- Ensure that Clients data and confidential documents are stored safely with restricted access.
- Ensure that Clients data is transferred only to relevant stakeholders (e.g., insurance companies, Intermediaries/ auditors).

- التأكد من أن بيانات العملاء ومستنداتهم السرية محفوظة في مكان آمن مع حصر إمكانية استخدامها على مجموعة محدّدة.
- التأكد من حصول الأطراف المعنية فقط على بيانات العملاء إلى مثل شركات التأمين والمراجعين الخارجيين الخاصين بالوسطاء والوكلاء.

Client Notification:

إخطار العملاء:

50. Intermediaries shall:

٥٠. يجب على الوسطاء والوكلاء:

- Promptly notify Clients, using a written confirmation that the insurance contract has been entered into.
- Notify Clients with the changes made to the terms and conditions of an insurance contract and give reasonable notice before any change takes effect.
- Inform Clients of any termination of coverage or potential problems within the duration of policy coverage.

- إخطار العملاء كتابةً عند بداية عقد التأمين.
- إخطار العملاء بأي تغيير يجري على بنود وشروط عقد التأمين مع إرسال إشعار قبل تفعيل أي تغيير بمدة كافية.
- إخطار العملاء بأي حالة إنهاء مبكر للتغطية التأمينية أو أي مشكلات متوقعة خلال مدة التغطية التأمينية.



Policy Renewal:

تجديد وثيقة التأمين:

51. Intermediaries shall:

٥١. يجب على الوسطاء والوكلاء:

- a) Ensure that renewal notices include Clients' duties to disclose changes affecting the policy, which have occurred since the policy inception or the last renewal date.
أ) التأكد من أن إخطارات التجديد تتضمن واجبات العملاء نحو الإفصاح عن التغييرات التي تؤثر على وثيقة التأمين التي حدثت منذ بداية وثيقة التأمين أو منذ آخر تاريخ للتجديد.
- b) Ensure that renewal notices contain a requirement for keeping records, including copies of letters, of all information supplied to the insurance company for the purpose of renewal of the contract.
ب) التأكد من أن إخطارات التجديد تتضمن شرطاً ينص على الاحتفاظ بالسجلات بما في ذلك نسخ من الخطابات وجميع المعلومات المقدمة لشركة التأمين بغرض تجديد العقد.
- c) Ensure that Clients are aware of the expiry date of the insurance contract even if no further coverage is granted.
ج) التأكد من معرفة العملاء تاريخ انتهاء عقد التأمين حتى عند عدم رغبة الشركة تجديد التغطية التأمينية.
- d) Ensure that Clients receive insurance company's renewal invitations well in time before the expiry date.
د) التأكد من تلقي العملاء دعوة تجديد عقودهم الصادرة عن شركة التأمين بمدة كافية قبل تاريخ الانتهاء.

Claims Handling:

التعامل مع المطالبات:

52. Intermediaries are not allowed to approve and settle claims but shall:

٥٢. لا يحق للوسطاء والوكلاء الموافقة على المطالبات وتسوية المطالبات ولكن يجب عليهم:

- a) Respond to claims filing in a prompt manner.
أ) الإجابة على المطالبات المقدمة بصورة فورية.
- b) Provide claims forms showing all the information or steps required by Clients to file a claim.
ب) تقديم نماذج المطالبة مع إيضاح المعلومات أو الخطوات اللازمة من جانب العملاء لتقديم المطالبة.
- c) Provide adequate guidance to
ج) تقديم الإرشاد الكافي للعملاء بشأن تقديم



- Clients in filing the claim and information on the claims handling process.
- المطالبة وتقديم المعلومات الخاصة بالتعامل مع المطالبات.
- d) Acknowledge to Clients the receipt of the claim and any missing information and documents within seven (7) calendar days from the reception of the claim application form.
- د) تقديم إقرار للعملاء يفيد استلام المطالبة كاملة أو عند وجود أي معلومات أو مستندات ناقصة خلال سبعة أيام من تاريخ استلام نموذج تقديم المطالبة.
- e) Inform Clients of the progress of filed claims, at least every fifteen (15) working days.
- هـ) إخطار العملاء بأي تطور بشأن المطالبة المقدمة مرة كل خمسة عشر يوم عمل على الأقل.
- f) Notify Clients in writing of the claim acceptance or refusal.
- و) إخطار العملاء كتابةً بقبول المطالبة أو رفضها.
- g) Explain the complaints and disputes process if the settlement is not accepted by Clients.
- ز) توضيح طريقة تقديم الشكاوى وإجراءات الفصل في منازعات العملاء عند عدم قبول العميل التسوية التي جرى التوصل إليها.
53. Intermediaries must transfer claims amounts to policyholders within a period of 3 working days from the date of receipt from insurance companies
٥٣. يجب على الوسطاء والوكلاء تحويل مبالغ المطالبات للمؤمن له خلال فترة ثلاث أيام عمل من تاريخ استلامها من شركة التأمين.

Client Complaints:

شكاوى العملاء:

54. Intermediaries shall:

٥٤. يجب على الوسطاء والوكلاء:

- a) Accept complaints either by phone or in writing (e.g., letters, e-mails, and fax).
- أ) قبول الشكاوى سواءً عن طريق الهاتف أو كتابةً مثل الخطابات أو البريد الإلكتروني أو الفاكس.
- b) Explain the procedures to be followed when filing a complaint.
- ب) شرح الإجراءات اللازم اتباعها عند تقديم الشكاوى.
- c) Provide Clients with the contact reference to follow up on the filed
- ج) تزويد العملاء بوسائل الاتصال بالشركة



complaint.

لمتابعة الشكاوى المقدمة.

d) Inform Clients on the progress of the filed complaint.

د) إخطار العملاء بتطورات تسوية الشكاوى المقدمة.

e) Respond to policyholder's complaints within fifteen 15 calendar days from the reception of correspondence.

هـ) الرد على شكاوى المؤمن لهم خلال خمسة عشر يوماً من استلام الشكاوى.

f) Have in place an electronic system for recording and monitoring complaints.

و) الاحتفاظ بنظام إلكتروني لتسجيل الشكاوى ومتابعتها.

Financial Reporting:

إعداد التقارير المالية:

55. Intermediaries shall complete and submit the set of intermediaries' financial reporting forms to SAMA according to the financial reporting forms guidelines.

٥٥. يجب على الوسطاء والوكلاء استيفاء مجموعة نماذج التقارير المالية الخاصة بهم وتقديمها إلى مؤسسة النقد العربي السعودي وفقاً لتعليمات إعداد نماذج التقارير المالية.



Appendix A: Maximum Commission Rates Permitted		الملحق (أ): الحد الأقصى للعمولات المسموح به	
Classes of Business	Commission Rate	معدل العمولة	فروع التأمين
Accident & Liability Insurance	15%	٪١٥	التأمين من الحوادث والمسؤولية
Personal Accident	15%	٪١٥	التأمين من الحوادث الشخصية
Work Related	15%	٪١٥	التأمين من إصابات العمل
Employer's Liability	15%	٪١٥	التأمين من مسؤولية رب العمل
Third Party Liability	15%	٪١٥	التأمين من المسؤولية تجاه الغير
General Liability	15%	٪١٥	التأمين من المسؤولية العامة
Product Liability	15%	٪١٥	التأمين من المسؤولية الناتجة عن المنتجات
Medical Liability	15%	٪١٥	التأمين من المسؤولية الطبية
Professional Liability	15%	٪١٥	التأمين من المسؤولية المهنية
Theft & Burglary	15%	٪١٥	التأمين من السرقة والسطو
Fidelity	15%	٪١٥	التأمين من خيانة الأمانة
Safe Burglary	15%	٪١٥	التأمين على الأموال التي في الخزينة، وأنشاء النقل
Any Other Liability	15%	٪١٥	تأمينات أخرى تقع ضمن نطاق التأمين من المسؤوليات
Motor Insurance - Compulsory	8%	٪٨	التأمين على المركبات - إلزامي
Motor Insurance - Compulsory + Others	15%	٪١٥	التأمين على المركبات - إلزامي + أخرى
Property Insurance	15%	٪١٥	التأمين على الممتلكات
Fire Insurance	15%	٪١٥	التأمين من الحريق
Marine Insurance - Hull	15%	٪١٥	التأمين البحري - هياكل السفن
Marine Insurance - Cargo	15%	٪١٥	التأمين البحري - التأمين على البضائع
Aviation Insurance	15%	٪١٥	تأمين الطيران
Energy Insurance	15%	٪١٥	تأمين الطاقة
Engineering Insurance	15%	٪١٥	التأمين الهندسي
Other General Insurance Classes	15%	٪١٥	فروع التأمين العام الأخرى
Health Insurance - Compulsory	8%	٪٨	التأمين الصحي - إلزامي
Health Insurance - Compulsory + Others	10%	٪١٠	التأمين الصحي - إلزامي + أخرى
Protection Insurance	15%	٪١٥	تأمين الحماية
Protection & Savings Insurance	15%	٪١٥	تأمين الحماية مع الادخار
Other Protection & Savings Insurance	15%	٪١٥	فروع تأمين الحماية والادخار الأخرى

The Unified Compulsory Motor Insurance Policy



THE UNIFIED COMPULSORY MOTOR INSURANCE POLICY



The Unified Compulsory Motor Insurance Policy

Article 1

Based on the Law on Supervision of Cooperative Insurance Companies issued under Royal Decree No. M/32 dated 02/06/1424 H, the Implementing Regulations issued under the Minister of Finance's resolution No. 1/596 dated 1/3/1425 H, and the Council of Ministers' Resolution No.222 dated 13/08/1422 H concerning compulsory motor insurance, this unified policy shall be effective as from the date of its approval by SAMA's Governor, and shall replace the "Third Party Liability Insurance Policy (Motor)" issued by the Governor's resolution No. 1/427 dated 18/05/1427 H.

Article 2

Definitions

The following words and phrases in this policy, wherever they occur shall have the meanings indicated against each, unless the context indicates otherwise:

- 1. Compulsory Insurance Policy (the policy):** motor third party liability insurance policy under which the insurer undertakes to indemnify the third party upon the occurrence of a loss covered under the policy, for a premium paid by the insured. This policy shall include the promissory warranty certificates and appendices (if any) provided that they shall not contradict or violate the provisions stated in this policy.
- 2. Company (the insurer):** an insurance company that accepts insurance directly from the insured.



3. **The insured:** a natural or juristic person who signs with the insurer the insurance policy and whose name is stated in the policy schedule.
4. **Driver:** whoever is driving a vehicle, public work equipment or a motor bike at the time of the accident.
5. **Vehicle:** any transport means designed to move by wheels or chain, being moved or pulled by an engine or animal power, as described in the policy (trains are excluded).
6. **Third party:** any natural or juristic person who sustains loss covered under the provisions of this policy, excluding the insured and/or the driver.
7. **Physical damages:** death and/or physical injuries which may be inflicted on the third party, including partial or total disability, whether permanent or temporary.
8. **Material Damages:** damages to property belonging to the third party.
9. **Medical expenses:** costs and expenses of medical treatment and medicines, which are incurred by the third party as a result of an accident covered by insurance under this policy.
10. **Other expenses:** expenses which are incurred by the third party because of the accident, including the expenses of towing or transferring the vehicle and damage assessment costs.
11. **Claim:** written notification submitted to the company requesting indemnity for an accident covered under the provisions of this policy.



- 12. Claimant:** natural or juristic person who is harmed due to an accident covered under this policy, including the heirs of the natural person in the event of his death.
- 13. Indemnity:** amounts to be paid by the company to a third party within the maximum civil liability specified in this policy.
- 14. Premium:** amount paid by the insured to the company for its agreement to indemnify the third party for damage or loss whose direct cause is a risk covered under this policy.
- 15. Civil liability:** the liability of the insured and / or the driver towards a third party for material or physical damages inflicted by the insured vehicle.
- 16. Material fact:** any fact that affects the company's decision to accept or reject insurance or affects the insurance premium or terms and conditions of the contract.

Article 3

Insurance coverage

Whereas the insured has submitted to the company an insurance proposal form, which is considered the basis for this policy; and has paid (or has undertaken to pay) the required premium; and the company accepted this proposal, the company shall, in the event of a loss covered under this policy whether such loss arose from the use of a vehicle or its stopping in the territory of the Kingdom of Saudi Arabia, indemnify in cash the third party in accordance with the terms and conditions set forth in this policy for all the amounts that the insured or the driver is committed to pay for:



- a) physical damages caused to a third party inside or outside the vehicle.
- b) material damages outside the vehicle.

Article 4

Coverage limits

In the event of the occurrence of an accident resulting in the payment of indemnity in accordance with the provisions of this policy, the maximum limit of the company's liability for one event for both physical damage (including blood money, bodily injuries damages and medical expenses) and material damages, shall not exceed together a total sum of SR 10,000,000 (ten million Saudi riyals) as a coverage liability limit.

Article 5

Cases in which the company is not allowed to disclaim liabilities towards third- party

The company may not disclaim liability for indemnity under this policy towards the third party because the insured or the driver has committed any violation, whether the violation has been before or after the accident, or because of the insured's or the driver's non-compliance with what is stated in this policy, without prejudice to the company's right of recovery from the insured or the driver after indemnifying the third party if the recourse is justified.



Article 6

Cases in which the company is committed to indemnify the third party while reserving the right of recourse against the insured, the driver or the person causing the accident.

The company has the right of recovery from the insured, the driver or the person causing the accident to recover the amount it had paid to the third party in any of the following cases:

1. Any liability or expenses arising or occurring where the insured vehicle is:
 - a. Used in contravention of restrictions set forth in the schedule.
 - b. Carrying passengers beyond the capacity authorized for the vehicle, and it has been proved that the accident occurred because of this violation.
 - c. Used in any type of racing, in determining the speed of starting off, or in testing the ability to drive.
 - d. Driven by a person under the influence of drugs, alcohol or medicines that are not allowed to be taken when going to drive.
 - e. Driven by any person under the age of 21 years unless insured or among the names of authorized drivers whose age is less than 21 years under the policy schedule .
 - f. Stolen or taken by compulsion.



- g. Driven by any person not carrying a driving license or a permit qualifying him to drive this type of vehicles or whose driving license is temporarily or permanently suspended .
 - h. Used in areas that are normally not allowed for the public to drive in such as airports or seaports, unless the vehicle is used for commercial purposes to be driven within the allowed area.
2. If it is proved that the insured has made false representations or concealed material facts in the insurance proposal form in such a way as to affect the company acceptance of risk coverage, the insurance premium or its terms and conditions.
 3. If it is proved that the accident was made deliberately by the insured or the driver .
 4. Failure on the part of the insured to notify the company in writing within ten working days of any material change to his disclosures in the insurance proposal form .
 5. Escape of the insured or driver of the vehicle from the scene of the accident.
 6. Acknowledgement by the insured or the driver to bear the liability for the accident undeservedly for the purpose of harming the company.
 7. Crossing the traffic red light by the insured or driver .
 8. Driving the vehicle in the opposite direction of the traffic line.



9. Car drifting.

Article 7

Claim Settlement Procedures

Upon receiving any claim, the company shall be committed to provide the claimant with a receipt acknowledging its receipt and informing the claimant of any missing documents, within 7 days from receiving the claim. It shall also appoint an assessor or loss adjuster, if necessary, within a period of no more than 3 days from receiving the claim.

The company shall settle the claim amounts, as determined by the General Traffic Department or Najm Company for Insurance Services or other authorized entities, and covered under this policy with integrity and fairness without any bargaining, within a maximum period of 15 Hijrah Calendar days from the date of receiving the claim with complete documents. If the company fails to settle the claim within that prescribed period for unjustified reasons, the beneficiary under this policy, shall be entitled to file a petition of dispute at the Committees for Resolution of Insurance Disputes and Violations, to compel the company to compensate the beneficiary for any incurred expenses as a result of loss of use of his vehicle due to the company's delay in settling the claim (such as the costs of hiring an alternative car) .

The company shall be committed to inform the claimant in writing of its acceptance or rejection of the claim. In case of acceptance,



the company must clarify the amount of indemnity, and how it was reached. In case of rejection, the company shall:

1. Provide the claimant with the reasons for rejection .
2. Inform the claimant of his right to file a petition of his case to the Committees for Resolution of Insurance Disputes and Violations according to Article 20 of the Law on Supervision of Cooperative Insurance Companies, so as to be considered by those committees .
3. Provide the claimant, upon his written request, with copies of documents in support of the company's decision.

Article 8

General Conditions

1. Multiple sources of insurance and other insurance coverage:

If the vehicle is insured with the same type of insurance by more than one company, the company shall only pay a portion of the indemnity amount, expenses or fees equal to the ratio between the sum insured and other total sums insured. In case there is another type of any insurance, which covers the liability or expenses for the same cover (such as the availability of motor comprehensive insurance policy), the company shall be liable to cover that responsibility or other expenses incurred by the third party, and then it subrogates on behalf of the insured by requesting other insurance companies to pay their relative percentage of such a claim.



2. Alterations:

The insured shall, within 10 working days, notify the company in writing of any material change in the representations that have been stated explicitly by him in the insurance proposal form. The company shall notify the insured within 3 working days from the date of receiving the insured's aforementioned notification if it decided to refuse to provide coverage to the insured.

3. The company's subrogation right to handle legal proceedings and settlement:

The company has the right to:

- a. Represent the insured or the driver in any investigation or interrogation related to a claim subject of indemnity under this policy.
- b. Handle legal proceedings for defending the insured or the driver before any judicial body against any allegation or accusation related to an accident subject of indemnity under this policy.

4. The company's right to include the insured's name in the Saudi Credit Bureau (SIMAH) system:

The company has the right to include the name of the insured in the Saudi Credit Bureau (SIMAH) system if the insured defaults in paying the amounts due to the company, whether insurance premiums or claims recoveries.

5. Obligations of the insured or driver in case of occurrence of an accident covered under this policy:



- a. Shall inform the concerned authorities as soon as an accident, covered under this policy, occurs and shall not leave the scene of the accident until procedures will have been completed, except in cases where leaving the scene of the accident is required such as in the case of physical injuries or awaiting for the concerned authorities for not less than two hours.
- b. Shall not claim responsibility with the intention of harming the company, pay or undertake to pay any amount to any party involved in the accident except after obtaining a prior written approval from the company.
- c. Shall cooperate with the company, and issue powers of attorney enabling the company to carry out the proceedings, defending and settlement procedures on behalf of the insured or the driver if the company expresses its desire to do so.
- d. Shall, at the company's expense, perform all required works to guarantee the company's right for recovering from any other party any amounts due to it as a result of indemnity paid by it in accordance with this policy.

6. Obligations of the Company in case of delay in settlement of a claim with completed documents:

The company shall be committed to compensate the beneficiary of the coverage of this policy for any cost incurred as a result of loss of use of his damaged vehicle due to the company's delay for more than 15 days in settling the claim after completion of all required



documents of the claim, without providing acceptable excuses for the delay of paying the indemnity.

7. Fraud:

The right arising from this policy shall be forfeited if the claim involves fraud; or if the insured, the driver or the agent of any of them or a third party uses fraudulent ways or methods to gain benefit from this policy; or if liability or loss results from a deliberate act by the insured, the driver, or others or due to collusion with any one of them. The company may recourse to any party who appears to have been responsible for this fraud either by participation or collusion. Then the company, however, shall be committed to indemnify a third party if his intention is good.

8. Cancellation

Neither the company nor the insured shall have the right to cancel this policy after its issuance except in the following situations:

- i. Cancellation of the vehicle registration.
- ii. Transfer of ownership of the vehicle to another owner.
- iii. Producing a substitute policy from another company.

If the insured desires to cancel his policy, he shall return the policy to the insurer along with a cancellation request, and the insurer shall be committed to pay, within fifteen working days from the date of request, a proportional amount of the premium according to the following table:



Validity period of the policy before requesting cancellation	The proportional amount of the premium to be paid by the company to the insured
1-7 days	87.5%
8-30 days	75%
31-60 days	60%
61-90 days	50%
91-120 days	45%
121-150 days	40%
151-180 days	35%
181-210 days	25%
211-240 days	20%
241-270 days	10%
271-365 days	0%

Despite what has been mentioned before, the insurer, the insured, and the driver shall remain committed to the provisions of the policy in connection with obligations arising before its cancellation.

9. Policy Issuance and Renewal Notification:

The company may not issue this policy if it is not electronically linked with the system of Najm Company for Insurance Services. The company shall notify the insured of the expiry date of the policy two weeks prior to the expiry date, so that it can be renewed or replaced by a policy from another company.



10. Judicial jurisdiction and governing law:

- a. Any dispute that arises in connection with this policy shall be subject to the laws and regulations in force in the Kingdom of Saudi Arabia, and it shall be settled by the Committees for Resolution of Insurance Disputes and Violations set forth under Article No. (20) of the Law on Supervision of Cooperative Insurance Companies, issued by Royal Decree No. M/32 dated 2/6/1424H.
- b. Any case arising in connection with this policy shall not be looked into after three years from the occurrence of the incident of which the parties concerned were informed, unless the Committees for Resolution of Insurance Disputes and Violations is satisfied with the reason for its consideration.

Article 9

Exclusions (Cases uncovered under this policy)

Insurer shall not be liable for paying any indemnities in any of the following cases:

1. Any liability or expenses arising, directly or indirectly, from the following:
 - a. War, invasion, acts of foreign enemy, hostilities, warlike acts (whether war is declared or not), or civil war.
 - b. Rebellion, military or popular uprising, insurgence, revolution, usurping authority, martial laws, siege; or any events or reasons leading to declaring or continuation of martial laws, siege, or acts of vandalism and terrorism committed by person(s)



working individually or on behalf of or related to any terrorist organization. Terrorism shall mean the use of violence for political, intellectual, philosophical, racial, ethnic, social, or religious purposes. The use of violence includes putting the public and/or a segment of it under panic condition; affecting and/or causing turmoil; intervening in any operations and/or activities or policies related to the government; or causing turbulence negatively affecting the national economy or any of its sectors.

- c. Strikes, riots, or civil or labor disorder.
 - d. What has been caused by, arisen from, or contributed to by nuclear weapons, ionizing radiations, radioactive contamination due to any nuclear fuel or waste which results from the burning of nuclear fuel. For the purposes of this exclusion, burning shall include any nuclear fission process.
 - e. Natural disasters such as hurricanes, earthquakes, floods, or volcanoes.
- 2. Death or physical injury to the insured, or driver.
 - 3. Loss or damage to the insured vehicle or properties pertaining to either the insured or the driver inside or outside the vehicle.
 - 4. Damage or loss to the goods transported by the insured vehicle.
 - 5. Fines, financial penalties, guarantees or warranties which may be imposed on the insured or the driver due to the accident.



6. Accidents occurring outside the geographical territory specified in the policy schedule.

Article 10

Distribution of Surplus

The surplus shall be distributed to insured beneficiaries in accordance with the provisions of Article 70 of the Implementing Regulations of the Law on Supervision of Cooperative Insurance Companies issued by Royal Decree No. M/32 dated 2/6/1424 H.



Schedule of the Unified Compulsory Motor Insurance Policy

Insured Type:	Personal/ Commercial	Policy No.	
Insured Particulars			
Insured's ID No.	1. Personal (individual) - National identification number for Saudi nationals - Residence permit (Iqama) number for expatriate individuals 2. Computer number of companies and institutions		
Name of insured			
Phone No.			
Address			
Vehicle Particulars			
Owner's ID No.		Owner's Name	
Plate No.		Chassis No.	
Color		Vehicle Registration Expiry Date	
Type of Chassis		Customs Card No.	
Vehicle Brand		Year of Manufacture	
Vehicle Model		Purpose of Use	
Type of Registration	(Private/ Private Trans/ Private Bus/ Public Transportation Vehicle/ Public Bus/ Taxi/ Diplomatic and consulate / Temporary/ Public Works Vehicle/ Motorcycle) Plate		
Coverage Type	Comprehensive/ Third Party		
Names of the Authorized Drivers under the age of 21 (with their Driving Licenses' Numbers)			
Geographic Limits	On the Saudi Arabian Territories		
Use Restraints	Insured Shall not Use the Vehicle for Other than Its Licensed Purpose		
Premium Amount			
Policy Issuance Date			
Coverage Period	From.....(Day) .../.../.....(Date)(Time) To(Day) .../.../.....(Date)(Time)		